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The Common Law in India



BY

M C SETALVAD Padma Vibhushan

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NOTE

This is a reprint of the English edition published in 1960 The mistakes in that edition have been corrected and a Table of Cases Index and Bibliography have been added for the convenience of readers particularly students

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THE HAMLYN TRUST

THE Hamlyn Trust came into existence under the will of the late Miss Emma Warburton Hamlyn of Torquay who died in 1941 aged eighty She came of an old and well known Devon family Her father William Bussell Hamlyn practised in Torquay as a solicitor for many years She was a woman of dominant character intelligent and cultured well versed in literature music and art and a lover of her country She inherited a taste for law and studied the subject She travelled frequently on the Continent and about the Mediterranean and gathered impressions of comparative jurisprudence and ethnology

Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague The matter was taken to the Chancery Division of the High Court which on November 29 1948, approved a scheme for the administration of the Trust Paragraph 3 of the Scheme is as follows

> The object of this charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and the Ethnology of the chief European countries including the United Kingdom and the circumstances of the growth of such jurisprudence to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in

comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them

The Trustees under the Scheme number nine *viz*

The Trustees decided to organise courses of lectures of high interest and quality by persons of eminence under the auspices of co-operating Universities or other bodies with a view to the lectures being made available in book form to a wide public

The twelfth series of Hamlyn Lectures was delivered in October 1960 by Mr M C Setalvad Padma Vibhushan the Attorney General of India at Lincoln s Inn by courtesy of the Treasurer and Masters of the Bench of the Honourable Society of Lincoln s Inn and with the co-operation of the British Council

JOHN MURRAY
October 1960 *Chairman of the Trustees*

Chapter I

THE RISE OF THE COMMON LAW

I Introductory

The scheme of the Trust under whose auspices I have the privilege of delivering these lectures speaks of the furtherance among the Common People of the United Kingdom of the knowledge of the Comparative Jurisprudence of the chief European countries The theme of these lectures has perhaps a wider scope We shall undoubtedly be in the realm of comparative jurisprudence but the comparison will be between the basic principles which have been the foundation of the public and private law of England and the system of laws and administration of justice called the Anglo Indian or the Indo British system into which these basic English principles have in the course of over two centuries grown and developed

Beginning with its application in the seventeenth century to British subjects in small areas in certain parts of India which were known as the Company s factories the common law of England with its statutory modifications and the doctrines of the English courts of equity has deeply coloured and influenced the laws and the system of judicial administration of a whole sub continent inhabited by nearly four hundred million people The law and jurisprudence of this vast community and its pattern of judicial

administration are in many matters different from those of England in which they had their roots and from which they were nurtured Yet they bear the unmistakable impress of their origin The massive structure of Indian law and jurisprudence resembles the height the symmetry and the grandeur of the common and statute law of England In it one sees English law in the distant perspective of a new atmosphere and a strange clime

The growth of a jurisprudence so closely modelled on the English pattern would have caused no surprise had the English settlements in India been in an uninhabited or barbarous country To such a country they carry with them not only the laws but the sovereignty of their own state and those who live amongst them and become members of their community become also partakers of and subject to the same laws [1] But this was not the nature of the *first settlement* made in *India* That was a *settlement* made by a few foreigners for the purpose of trade in a very populous and highly civilised country under the Government of a powerful Mahomedan ruler with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards [2] It will be the purpose of these lectures to unfold the fascinating story of what Sir Frederick Pollock has called the Expansion of the Common Law in India

[1] *Advocate General of Bengal* v *Ranee Surnomoye Dossee* (1863) 9 Moore Ind App 424
[2] *Ibid* at pp 424 425

An account of the development and growth of Indo British jurisprudence would in a way be in extricably mixed up with the history of the founda tion of the courts in various parts of India and the statutes of the British Parliament and the charters granted by the British Crown which defined their powers and jurisdiction and prescribed the laws which they were to apply But we have to bear in mind that the study of comparative jurisprudence contemplated by the Hamlyn Trust is for the bene fit of the Common People of the United Kingdom It will therefore be my endeavour to trace the deve lopment of Indian jurisprudence through a period of over two centuries pointing out its close similarity to what may be termed the mother jurisprudence of England in as simple a manner as possible

I have chosen as the title of these lectures The Common Law in India The expression Common Law of England would necessarily convey to the purist of jurisprudence those unwritten legal doc trines embodying English custom and English tradi tion which have been developed over the centuries by the English courts So understood it would not include and would be different from the English statute law which has from time to time modified the common law But the English brought into India not only the mass of legal rules strictly known as the common law but also their traditions out look and techniques in establishing maintaining and developing the judicial system When therefore I speak of the common law in India I have in view

comprehensively all that is of English origin in our system of law In that wide meaning the expression will include not only what in England is known strictly as the common law but also its traditions some of the principles underlying the English statute law the equitable principles developed in England in order to mitigate the rigours of the common law and even the attitudes and methods pervading the British system of the administration of justice My justification for the use of the expression in such an extended sense is perhaps the difficulty in finding a more appropriate expression

II HISTORICAL

Period ending A D 1726

The history of present day Indo-British jurisprudence commences with the formation of the London East India Company in 1600 in the reign of Queen Elizabeth I The charters of Queen Elizabeth and James I granted to the Company in the years 1600 and 1609 gave the power to them to make ordain and constitute such and so many reasonable laws constitutions orders and ordinances as to them shall seem necessary so always that the said laws orders constitutions ordinances imprisonments fines and amerciaments be reasonable and not contrary or repugnant to the laws statutes customs of this our realm [3] The position of the Company s factories in India was at that time somewhat

[3] H Cowell *Tagore Law Lectures* 1872 12 13

anomalous They were generally speaking a part of the dominion of the Moghul Yet since the very early days the Company had obtained the authority of the British Crown to administer justice and constitute judicial authorities in the areas covered by these factories In order that they might be able to administer justice according to their own notions and in accordance with laws with which they were familiar the Company had endeavoured to obtain permission to administer their own laws in these areas Thus Sir Thomas Roe the Ambassador of James I of England had secured by a treaty with the Moghuls in 1618 the privilege of deciding the disputes between the English in their factory at Surat[4]

In 1661 the charter of Charles II gave to the Government and Council of several places belonging to the Company the power to judge all persons belonging to the said Government and Company or that should live under them in all causes whether civil or criminal according to the laws of this Kingdom and to execute judgment accordingly This general provision is understood to have put the judicial power in the sole hands of the executive government and restricted the law to be administered to that in force in England

Almost contemporaneously with this charter came the cession of the island of Bombay by the Portuguese to the English and its lease by Charles II to

[4] *Ibid* 5th ed p 12
[5] Fawcett *The First Century of the British Justice in India* 1934 Introduction p xix

the East India Company in 1668 at a quit rent of £10 per year This was territory which had for a considerable period been under Portuguese rule and Portuguese law governed it It is interesting to see how the island which was not part of the territory of the Moghuls like the factory areas and which came under the sovereignty of the Crown was treated in the matter of the administration of justice and the application of laws

The charter of Charles II transferring the island to the Company required the Company to enact laws consonant to reason and not repugnant or contrary to and as near as may be agreeable to the English laws The charter also directed that the courts and their procedures should be like unto those that are established and used in this our realm of England [6]

Rules for the civil government and equal distribution of justice upon the island were drafted in England by the Companys law officers and after the approval by the Solicitor General a draft was settled and engrossed to be sent out to India in 1669 These laws were divided into six main sections which included a section entitled Establishing a Method for Due Proceedings This section provided for the establishment of a court of judicature for the decision of all suits and criminal matters under a judge to be appointed by the Governor and Council and for all trials in the court to be by a jury of twelve Englishmen except when any party to the dispute

[6] *Ibid* p 6

was not English in which case the jury was to be half English and half non English It also made provision for regular sittings of the court the recording of its proceedings in registers, the fixing of reasonable court fees and for a right of appeal from the court of judicature to the Governor or Deputy Governor, and Council which was constituted the Supreme Court in the port and island[7]

There is little information about the administration of criminal justice during this period and the application of the laws of the Company But the correspondence between Bombay and Surat where the factory of the Company was situated and where the Governor resided contains references to the trial by jury of crimes like theft murder and mutiny The Governor s instructions dealing with a case of mutiny by soldiers are interesting

> For the tryall of those notorious mutiners that tore the Proclamation and opposed the execution of justice on the wench you caused to be shaved and sett on an ass lett a Jury be empannelled whom if they find guilty of mutiny lett them be sentenced condemned and executed according to the 3rd Article of the Hon Company s Lawes for the preservation of the peace and suppression of mutiny sedition and Rebellion [8]

It is said that the punishment of the wench resembled that used by Moslems when they wanted to humiliate an offender The authorities in Bombay evidently did not always feel themselves bound by the penalties prescribed by the Company s laws and took advantage of punishment more in accordance

[7] *Ibid* pp 13 16 [8] *Ibid* pp 42 41

with the prevalent punishments in the surrounding country

A more interesting case is that of the trial by a jury of twelve men of a wizard who was found guilty both of witchcraft and Murder The report of the trial states

> To the last wee intended to have hanged him only it was generally advised that burning would be farr the greater terrour as alsoe that a single wizard deserving hanging whereas he had now murthered 5 men in 6 months and had bin twice banished before for a wizard soe we burnt him *

In accordance with the prevailing belief in witch craft those in charge of the trial were, it appears fully convinced of the wizard s supernatural powers for they stated that when he lay in the midst of so great a fire yet not withstanding his great knot of haire on his head was intire It appears that the sentence of burning was one authorised by a statute of 1603 which continued in force till 1736 It further appears that the Company s laws left the mode in which a sentence of death should be carried out to the discretion of the Deputy Governor and Council

In the year 1672 the plan formed by Governor Aungier for the establishment of the English laws and a court of judicature in the island was put into execution The English laws voted to be put in practice is an entry made in the month of June 1672 and later there follows the issue of a proclama tion for abolishing (from and after the 1st day of

* *Ibid* pp 42 44

August next) the Portugal laws and for establishing the English [10]

A report written by a Mr Wilcox who was in effect the first judge to preside over the court to be established in December 1672 contains an account of the proceedings of the opening of the court on August 8 1672 which is somewhat reminiscent of the ceremonial observed in those years at the inaugura tion of courts in England

There was a ceremonial procession from the Fort through the Bazaar to the Guildhall in the following order
Fifty Bandaries in Green liveries marching two by two
20 Gentues
20 Mooremen } Each representing their several cast or sect marching two by two
20 Christians
His Honours horse of State lead by an Englishman
Two trumpets and Kettle Drums on horse back
The English and Portugal Secretary on horse back carrying his Majesties letters Patents to the Honble Company and their Commission to the Governor tyed up in scarfes
The Justices of the Peace and Council richly habited on horse back
The Governor in his Pallankeen with fower English pages on each side in rich liveries bare headed surrounded at distance with Peons and blacks
The Clerke of the Papers on foot
The fower Atturneys or Common pleaders on foot
The keeper of the prisons and the two Tipstaffs on foot bare headed before the Judg
The Judg on horse back on a Velvet foot cloath
His Servants in Purple serge liveries
Fower Constables with their staves
Two Churchwardens
Gentlemen in Coaches and Palakeens
Both the Companies of foot (except the main Guard) marching in the Reare [11]

[10] *Ibid* pp 48-49 [11] *Ibid* pp 52 55

After the imposing procession had reached the Guild hall there took place proceedings which are best described in the words of Wilcox himself

> the Governor entring the Court tooke the Chaire placing me next to him on his right hand and the Gentlemen of the Council and Justices tooke their places accordingly Proclamation being made and silence commanded the Clerke of the papers read his Majesties letters of Patents to the Honble Company for the Island Bombay then the English Secretary read the Company s Commission to the Governor which being done he was pleased to give me my oath as Judg as also my Commission which was likewise read next I swore the Publick notary and Coroner then the Clerk of the Peace swore the Churchwardens and Constables and their staves were delivered to them by the Governor with a charge to execute their re pective offices and places honestly and uprightly after this the Governor standing up (and the Court also rising was pleased to make a most excellent speech on commendation of the English laws

The noble words of Governor Aungier deserve to be reproduced for they enunciate principles which in the course of years that followed set the pattern for the administration of justice not only in the island but in other areas in the country which gradually fell under the sway of the British Said the Governor

> The Inhabitants of this I land consist of severall nations and Religions to wit—Engli h Portuguess and other Chris tians Moores and Jentues but you when you sit in this seat of Justice and Judgement must looke upon them with one single eye as I doe without distinction of Nation or Religion for they are all his Majesties and the Honble Company s subjects as the English are and have all an equall title and right to Justice and you must doe them all Justice even the meanest person of the Island and in particulare the Poore the Orphan the Widdow and the stranger in al matters of controversy of Common right and Meum and Tuum And

this not only one against the other but even against myself and those who are in office under me nay against the Honble Company themselves when Law Reason and Equity shal require you soe to doe for this is your Duty and therin will you be justified and in soe doing God will be with you to strengthen you his Majestie and the Company will commend you and reward you and I in my place shall be ready to assist Countenance honour and protect you to the utmost of the power and Authority entrusted to me and soe I pray God give his blessing to you [12]

Thus were laid the foundations in the seventeenth century albeit in the small area of the town and island of Bombay of the application of English laws to Indians residing in the Presidency Towns and of the system of administering justice fostered by the common law in England

The provisions which we have seen applied to what later became the Presidency Towns of Calcutta and Bombay Between 1686 and 1694 the Company purchased certain villages in Bengal with the consent of the Nawab of Bengal and acquired the status of a Zamindar in regard to these villages As the Zamindar the Company held Zamindar s courts exercising both civil and criminal jurisdiction These courts derived their authority from the Moghuls as the Company held its Zamindari from them The law administered and the procedure followed in these courts were similar to those in the courts where other Zamindars exercised the jurisdiction [13]

The year 1726 can be said to mark the end of the first period of the exercise of British power in India

[12] *Ibid* pp 5? 55 [13] *Ibid* p 208

It marked the rise of the factories at Bombay Madras and Calcutta which in course of time grew into the three Presidency Towns The Company gradually increased the area of its supervision and control over places surrounding these growing factories The surrounding areas were called the mofussil in contradistinction to the Presidency Towns These Presidency Towns played the leading role in the introduction of the common law into India

Mayors courts

In the year 1726 the Crown granted Letters Patent creating mayors courts in the Presidency Towns[14] These were not to be the Company s courts but courts of the King of England though at that time the King had no claim to sovereignty to any part of the country except the island of Bombay These courts consisted of the mayor and certain aldermen and were authorised "to try hear and determine all civil suits actions and pleas between party and party and "to give judgment and sentence according to justice and right" Appeals from the mayors courts lay to the Governor and Council who were made a court of record They were also constituted a court of oyer and terminer and gaol delivery to try as in England all offenders and offences except high treason committed within Madras Calcutta Bombay, their subordinate factories and within a distance of ten miles of these factories

[14] Letters Patent of September 24 1726 the 13th year of the Reign of George I

The Letters Patent enabled the courts to give judgment and sentence according to justice and right" Englishmen who were charged to make justice and right the rule of decision naturally drew upon the rules of the common law and the prevalent statute law in England in so far as they thought them applicable in the circumstances of the country

We have seen that the charter creating the mayors courts did not expressly state that the law to be applied by these courts was to be the law of England But decisions of the Privy Council have regarded the charter as clearly indicating such an intention and it has long been generally accepted doctrine that this charter introduced into the Presidency Towns the law of England—both common and statute law—as it stood in 1726 [15]

More than a century later in the year 1863 Her Majesty's Privy Council had occasion to consider when the English criminal law came to be introduced in India and also the extent of its application The interesting question which arose for consideration was whether the English law of *felo de se* and forfeiture of goods and chattels applied to a Hindu who was a British subject and who had committed suicide at Calcutta It was held that that rule did not apply to the early settlement of the English in India as the permission to the settlers to use their

[15] Rankin *Background to Indian La* (1946) p 1

own laws within the Factories did not extend those laws to Natives associated with them within the same limits The court however observed that "the English law civil and criminal has been usually considered to have been made applicable to Natives within the limits of Calcutta in the year 1726 by the Charter 13th Geo I Neither that nor the subsequent Charters expressly declare that the English law shall be so applied but it seems to have been held to be the necessary consequence of the provisions contained in them[16] This view as to the date of the introduction of English law into India appears to have been uniformally accepted by courts in India

However the First Indian Law Commission to whom we shall have occasion to refer later, in their Report of 1840 called the *lex loci* report took a different view, They maintained that neither the Hindu nor the Mahomedan law was the *lex loci* of British India as these laws were interwoven with religious beliefs, and that they were therefore inap plicable to persons professing a different faith They reasoned that there having existed no *lex loci* in the British possessions in India the English law became *ipso facto* the *lex loci*, when any Indian territory came under the authority of the British Crown and that the *lex loci* applied to all persons who did not belong to the Hindu or the Mahomedan faith They combated the view of the courts that the English law

16 *Advocate General of Bengal v Ranee Surnomoye Dossee* (1863) 9 Moore Ind App 387 4?6 427

had been introduced by the charters contending that the law having already applied to British India as its *lex loci* no question of its being brought in by the charters arose The Commissioners put its proposals into a draft Act of Parliament which in effect made the substantive law of England the law of the land outside the Presidency Towns applicable to all persons except Hindus and Mahomedans omitting certain parts of English statute and common law [17] These proposals were however, not accepted

Accepting that the Letters Patent of 1726 and the subsequent Charters had in effect applied English law to British India what was to be the date for ascertaining the English law to be applied? Was it to be the law as it prevailed in 1726 or was it also to include statutes passed even after 1726 or at any rate up to 1774 when the mayors courts in Calcutta were as we shall see substituted by the Supreme Court? An Act of Parliament passed in 1828 had provided that all laws and statutes in England on July 25 1888 should apply to New South Wales Victoria and Tasmania in Australia [18] Some of the states constituting the United States had by their constitutions provided expressly that British statutes passed up to a particular date were to be received as a part of their common law The English law applicable to India could not however be ascertained with reference to any particular date Indeed the

[17] Rankin *Background to Indian Law* p 28
[18] (1828) 9 Geo 4 c 83

view was expressed by Sir James Fitzjames Stephen the distinguished jurist that if the matter was looked at apart from what had been observed in some of the judicial decisions he would hold the view that not only the common and statutory law of England as it stood in 1726 but later English statutes had *come into force in India by reason of the later Char*ters of the mayors courts and the Supreme Courts [19]

In the year 1860 the Privy Council were called upon to decide the question whether the estate of a Hindu Brahmin dying without heirs escheated to the Crown as the sovereign power in British India The highest court for the mofussil of Madras the Sadar Diwani Adalat, had applied the Hindu law and had given effect to the text of the Hindu lawgiver that Never shall a King take the wealth of a priest, for the text of Manu forbids it The property of a Brahmin shall never be taken by the King this is fixed law The Judicial Committee held however personal law to be inapplicable observing that as soon as there is a total failure of heirs then the claim to the land ceases (we apprehend) to be subject to any such personal law The law of escheat intervenes and prevails and is adopted generally in all the courts of the country alike Private ownership not existing the State must be owner as ultimate lord [20]

[19] J F Stephen *The Story of Nuncomar and the Impeachment of Sir Elijah Impey* 1885 Vol II p 29
[20] *Collector of Masulipatam* v *Cavaly Vencata Narrainapah* (1860) 8 Moore Ind App 500 525

It appears that with the Charter of the mayors courts in 1726 the Company had sent to each Presidency a book of instructions and various forms prescribing the method of proceedings in civil suits criminal trials and probate and administration matters Thus consistent efforts were made to keep the courts in the straight and narrow path of English law [21] As observed by Sir Charles Fawcett the insistence on this law had of course its weak points It was in many respects unsuitable for the prompt and satisfactory disposal of civil and criminal cases in which the Native inhabitants of the settlements were concerned and the difference between the conditions of England and those of India and between the atmosphere of Westminster Hall and that of the courts in India was apt to be overlooked [21]

This led eventually to the amendment in 1753 of the Charter of 1726 The Letters Patent of 1753 re-establishing the mayors courts expressly excepted from the jurisdiction of the mayor s court all suits and actions between the Natives only and directed that these suits and actions should be determined among themselves unless both parties submitted them to the determination of the mayor s court This provision is considered by Morley [22] to be the first reservation of their own laws and customs to Indians The effect of the amended Letters Patent was to limit the civil jurisdiction of the mayors courts to suits between persons who were not Indians resident in

[21] Fawcett *op cit* pp 223 225
[22] *Digest* Vol I p clxix

the several towns to which the courts jurisdiction extended Suits between Indians resident in those towns could be entertained by these courts only with the consent of the parties The criminal jurisdic tion of these courts was confined to the towns where the courts were located and the factories or places subordinate to them and was not to extend beyond ten miles These courts and the law administered by them appear to have commanded the confidence of the Indian residents who continued to resort to these courts to much the same extent as before Indian litigation had in fact constituted the bulk of the work of these courts from their start and it con tinued to be so *notwithstanding the requirement of* the consent of Indians to the court exercising juris diction over them"[3]

We have so far referred to the mayors courts established in the Presidency Towns which were the courts of the King In the mofussil the Companys courts gradually changed their character becoming more and more the courts of the ruling power rather than the courts of the Zamindar In 1765 the Com pany obtained by the Firman of Shah Alam the Moghul the Diwani of Bengal Bihar and Orissa This has been regarded as the virtual acquisition by the Company of the sovereignty of these regions[24] The law administered in the courts in the mofussil was not the English law but the law of the Moghul to which the people had been accustomed

[3] *Fawcett op cit* pp 223 225
[4] Cowell *Tagore Law Lectures* 1872 p 30

When Warren Hastings came to set up civil courts in Bengal Bihar and Orissa after the Company had become the sovereign of these territories, he laid the foundation of the application of their personal laws to Hindus and Mahomedans which has continued up to today Regulation II of 1872 provided that these subjects of the Crown were to be governed by their own laws in suits regarding inheritance, marriage and caste and other religious usages and institutions In 1781 was added the word succession to the word inheritance and it was declared that where no specific directions were given the judges were to act according to justice equity and good conscience Thus was completed the scheme as to the rule of decision which the Companys new courts were to apply to matters coming before them [25] It required them to apply equity and good conscience which in the words of Lord Hobhouse at a much later date were generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances [26]

Supreme Courts

The Regulating Act of 1773[27] abolished the mayors courts and created the Supreme Courts for the Presidency Towns By that Act the Govern ment was empowered from time to time to make and issue such rules ordinances and regulations for

[25] Rankin *Background to Indian Law* p 2
[26] *Waghela Rajsanji* v *Shekh Masludin* (1887) 14 Ind App 89 96
[27] 13 Geo 3 c 63 ss 13 and 36

the good order and civil government of the said United Companys Settlements at Fort William aforesaid and other places and factories subordinate or to be subordinate thereto as shall be deemed just and reasonable (such rules ordinances and regulations not being repugnant to the laws of the nation) and to set impose inflict and levy reasonable fines and forfeiture for the breach and non observance of such rules ordinances and regulations Thus the authorities who were to make laws for the areas over which the Company exercised sovereignty were given the widest discretion to enact regulations which they deemed just and reasonable the only reservation being that they were not to be repugnant to the laws of England It is not surprising in the circumstances that the laws which came to be enacted were on the model of English laws with variations made necessary by Indian conditions

In 1774 came the establishment of the first of the Supreme Courts at Calcutta envisaged by the Act of 1773 It was to be a court of record and was to have such jurisdiction and authority as the Court of Kings Bench had in England by the common law of England (Clause IV) It was also to be a court of equity (Clause XVIII) It was also to be a court of oyer and terminer and gaol delivery at Calcutta and was to inquire into offences with the help of juries (Clause XIX) Like the Court of Kings Bench in England it was authorised to issue writs of mandamus certiorari procedendo or error (Clause XXI) It was to exercise ecclesiastical jurisdiction in Bengal

Bihar and Orissa such as was exercised in the diocese of London (Clause XXII) It had authority to appoint guardians of infants and of insane persons and of their estates (Clause XXV) It was also to be a Court of Admiralty The jurisdiction of the court extended to all British subjects residing in the whole of Bengal Bihar and Orissa It also extended to all persons employed in the service of the Company and in certain cases over other Indian inhabitants also The court was modelled entirely on the English pattern with jurisdiction over a large population in the Presidency Towns and other areas

The conflicts and contrasts resulting from differing system of law being worked in the Presidency Town and the mofussil were thus described by Sir Elijah Impey the Chief Justice of the court

> The state of the inhabitants of Calcutta was in every particular different They were as compared to the inhabitants of the provinces a very inconsiderable number inhabiting a narrow district and that district an English town and settlement not governed by their own laws but by those of England long since there established where there were no courts of Criminal Justic but those of the King of England which administered his laws to the extent and in the form and manner in which they were administered in England The inhabitants had resorted to the English flag and enjoyed the protection of the English law they chose those laws in preference to their own—they were become accustomed to them The town was part of the dominion of the Crown by unequivocal right —originally by cession founded on compact afterwards by capture and conquest Their submission was voluntary and if they disliked the laws they had only to cross a ditch and were no longer subject to them The state of an inhabitant in the provinces at large was that of a man inhabiting his own country subject to its own laws The state of an Hindoo a native of the provinces inhabiting Calcutta which in effect

was an English town to all intents and purposes did not differ from that of any other foreigner from whatsoever country he might have migrated he partook of the protection of the laws and in return owed them obedience [28]

Apart from the conflicting systems of law the wide jurisdiction of the Supreme Court and the absence of any delimitation of that jurisdiction in reference to the Company s courts in the mofussil created serious conflicts between the Company s government and the newly established court This led to the enactment of the Act of Settlement of 1781 (21 Geo 3 c 17) The effect of this statute was to abridge the powers and jurisdiction of the Supreme Court By that statute and by a later statute of 1797 (37 Geo 3 c 142) the Supreme Court in Calcutta and the recorders courts which were then functioning in Madras and Bombay were empowered to determine all actions and suits against the inhabitants of the said towns provided that their succession and inheritance to lands rents and goods and all matters of contract and dealing between party and party should be determined in the case of Mahomedans by the laws and usages of Mahomedans and in the case of Hindus by the laws and usages of Hindus and where only one of the parties should be a Mahomedan or Hindu by the laws and usages of the defendant The effect of these statutes was to take away the application of the English law to Hindus and Mahomedans in the matter of contracts and other matters

[28] Quoted by E C Ormond *The Rules of the High Court of Judicature at Fort William Bengal* (on the Original Side) (4th ed 1941) p 87

cording to justice equity and good conscience A similar provision was also made in regard to the Sadar Diwani Adalat What we have seen so far relates to the mofussil of Bengal But the same system of administration of justice and similar regulations as to the laws which were to be applicable were soon extended to other parts of the country like Banaras Oudh and Allahabad and eventually to the mofussil areas of Madras and Bombay

This rule of decision in accordance with justice equity and good conscience in the absence of specific directions meant in substance and in the circumstances the rules of English law wherever applicable In the words of Sir Henry Maine [9] India was then regard being had to its moral and material needs a country singularly empty of law The inevitable result was that the courts of justice had to legislate The vast gaps and interspaces in the substantive law were filled by the principles of English common and statute law The wide door of justice equity and good conscience made it easy for these principles to become through the decisions of the courts the governing law of the country

In 1862 the Privy Council reversing the Sadar Diwani Adalat applied the principles of English law regarding equitable mortgage by deposit of title deeds to the Presidency of Madras Speaking of the Company s courts in the mofussil of Madras Lord Kingsdown said that There is no prescribed general law to which their decisions must conform They

[29] Sir M E Grant Duff *Sir Henry Maine* p 51

are directed to proceed generally according to justice equity and good conscience [30] In 1865 Sir Richard Couch regarded that decision as an authority of the highest court of appeal that although the English law is not obligatory upon the courts in the mofussil, they ought in proceeding according to justice, equity and good conscience to be governed by the principles of the English law applicable to a similar state of circumstances [31] In 1887 Lord Hobhouse expressed the view that justice equity and good con science could be interpreted to mean the rules of English law if found applicable to Indian society and circumstances [32]

As in the case of civil courts there was also a hierarchy of criminal courts in the mofussil Control over the district criminal courts was vested in the Sadar Nizamat Adalat which was called the Sadar Foujdari Adalat in Madras and Bombay The crimi nal courts in the mofussil were guided principally by the Mahomedan criminal law which remained in force in Bengal and Madras till the enactment of the Indian Penal Code of 1860 But wherever its rules were found repugnant to British notions of crime and punishment they were from time to time modified by regulations made by the local government

In the Presidency of Bombay, however, Mahomedan criminal law generally did not prevail, [illegible]

[30] *Varden Seth Sam v Luckpathy* [illegible] 9 Moore Ind App 307 320

[31] *Dada v Babaji* (1864) 2 Bom H C [illegible]

[32] *Waghela Rajsanji v Shekh Masludin* (1887) 14 Ind App 89 96

being tried by their own criminal law and Parsees and Christians by English law [33] In this Presidency also regulations were passed from time to time defining offences and specifying punishments till the coming into force of the Indian Penal Code of 1860

Regulation III of 1793 heralded the gradual advance in India of the rule of law in the closing years of the eighteenth century It made executive officers of the Government who transgressed the law in the discharge of their official duties amenable to the jurisdiction of the courts This was soon followed by another significant change The Sadar Diwani and Nizamat Adalats the principal civil and criminal courts in the mofussil which in Bengal were constituted of the Governor and the members of his Council were by Regulation II of 1801 directed to be composed of a Chief Judge and puisne judges This measure made the highest judiciary independent of the legislative and executive authority of the state and laid the foundation of the independence of the judiciary in India

The lawyer and the common man of the time must verily have been at a loss to decide what the law applicable to a particular set of facts was Apart from common law rules and the personal laws of the parties there would appear to have been five different bodies of statute law in force There was the whole body of the English statute law existing in 1726 which applied at least in the Presidency Towns Parliament had subsequent to that date enacted

[33] Cowell 5th ed p 135

Acts which were extended to parts of India The Governor General in Council had also passed regulations commencing with the revised Code of 1793 which was in force only in the Presidency of Bengal Similarly there were the regulations of the Madras Council enacted over a long period which were in force in the Presidency of Madras Finally there were for the Presidency of Bombay the regulations of the Bombay Code starting from 1827[34]

This sad and perplexing state of affairs was portrayed in graphic language by the judges of the Supreme Court of Calcutta They observed

> In this state of circumstances no one can pronounce an opinion or form a judgment however sound upon any disputed right of persons respecting which doubt and confusion may not be raised by those who may choose to call it in question for very few of the public or persons in office at home not even the law officers can be expected to have so comprehensive and clear a view of the Indian system as to know readily and familiarly the bearings of each part of it on the rest There are English Acts of Parliament specially provided for India and others of which it is doubtful whether they apply to India wholly or in part or not at all There is the English Common Law and Constitution of which the application is in many respects still more obscure and perplexed Mahommedan Law and Usage Hindu Law Usage and Scripture Charters and Letters Patent of the Crown regulations of the Government some made declaredly under Acts of Parliament particularly authorising them and others which are founded as some say on the general power of the Government entrusted to the Company by Parliament and as others assert on their rights as successors of the Old Native Government some regulations require registry in the Supreme Court others do not some have effect generally throughout India others are peculiar to one presidency or one town There are commissions of the Governments and

[34] Cowell *op cit* pp 95 96

circular orders from the Nizamut Adalut and from the Dewani Adalut treaties of the Crown treaties of the India Government besides inferences drawn at pleasure from the application of the *droit public* and the law of nations of Europe to a state of circumstances which will justify almost any construction of it or qualification of its force [35]

This medley of laws widely differing from each other but coexisting and coequal led to the enactment of the Charter Act of 1833 which provided for the appointment of the first Law Commission of India Macaulay who spoke on the second reading of the Bill in Parliament said I believe that no country ever stood so much in need of a code of law as India and I believe also that there never was a country in which the want might be so easily supplied The principle is simply this—Uniformity when you can have it, diversity when you must have it but in all cases certainty [36]

Law Commissions

The first Law Commission presided over by Macaulay prepared a draft of the Indian Penal Code of 1860 perhaps the most outstanding of the Indian Codes It is based on the principles of the criminal law of England and has with little alteration been administered with satisfaction for nearly a century

The Charter Act of 1853 provided for the appointment of the second Law Commission whose activities led eventually to the passing of the first Indian Code

[35] Cited by C Grant before Committee on the Charter Act *Hansard* 3rd series Vol 18 p 729
[36] Cited by Whitley Stokes *The Anglo Indian Codes* Vol I p x

of Civil Procedure in 1859 and the first Limitation Act of India in the same year In 1860 and 1861 came the enactment of the Indian Penal Code and the Code of Criminal Procedure This Commission made proposals for the amalgamation of the Sadar Adalats the principal courts of appeal for the mo fussil and the Supreme Courts the principal courts in the Presidency Towns which were eventually accepted and led to the establishment of a High Court for each presidency as the highest court for the mofussil as well as the Presidency Town The ap pointment of the third Law Commission in 1861 led to the enactment of a general law of succession to the codification of the law of contract and evidence in 1872 and finally in 1877 to a law of specific relief embodying the equitable principles on which the courts of equity in England had dealt with the sub ject The appointment of the fourth Law Commi ssion in 1879 resulted in the enactment of the Nego tiable Instruments Act in 1881 and of the Trusts Act the Transfer of Property Act and the Easements Act in 1882 The labour of these Commissions con sisting of eminent English jurists spread over half a century gave to India a system of codes dealing with important parts of substantive and procedural civil and criminal law

It may well be asked how there could be room left for the application of the principles of English law in India once a large part of the law had been codified The codified law itself furnishes the answer In the codes are incorporated principles of

English law with variations needed by Indian conditions Indeed the codes explain and clarify the meaning of the rules laid down by them by illustrations which are based on English decisions

The process of the expansion of the common law into India was thus described by Sir Frederick Pollock in 1895

> In British India the general principles of our law by a process which we may summarily describe as judicial application confirmed and extended by legislation have in the course of this century but much more rapidly within the last generation covered the whole field of criminal law civil wrongs contract evidence procedure in the higher if not in the lower courts and a good deal of the law of property It is not too much to say that a modified English law is thus becoming the general law of British India The Indian Penal Code which is English criminal law simplified and set in order has worked for more than a generation among people of every degree of civilization with but little occasion for amendment In matters of business and commerce English law has not only established itself but has been ratified by deliberate legislation subject to the reform of some few anomalies which we might well have reformed at home ere now and to the abrogation of some few rules that had ceased to be of much importance at home and were deemed unsuitable for Indian conditions More than this principles of equitable jurisprudence which we seldom have occasion to remember in modern English practice have been successfully revived in Indian jurisdictions [37]

The Commissions we have referred to and the codes compiled by them became powerful instruments which injected English common and statute law and equitable principles into the expanding structure of Indian jurisprudence

[37] *The Expansion of the Common Law* (1904) pp 16 17

High Courts

This brings us broadly to the end of the period which marks the role of the Supreme Courts in the Presidency Towns and the Sadar Adalats in the mofussil The final phase during the British regime commenced with the High Courts Act of 1861 (24 & 25 Vict c 104) Letters Patent were issued in 1862 establishing High Courts at Calcutta Madras and Bombay which were replaced by the amended Letters Patent of 1865 The Letters Patent of 1862 brought about the long contemplated fusion of the Supreme and Sadar courts in each Province The High Court of Judicature in each Province was given power and authority as an original and appellate court over matters arising in the Presidency Towns and as an appellate court over matters arising in the mofussil A single superior tribunal was thus placed at the head of the judicial administration of the Province The judges who had constituted the Supreme Courts were English lawyers whereas those presiding over the Sadar courts were covenanted civil servants In the judiciary of the newly constituted High Courts both these elements were combined

The substantive civil law to be administered by the High Courts was to be the same as that administered by the courts to which it succeeded Thus the law to be administered by it in respect of the Presidency Towns continued to be different from that to be applied to the mofussil The law and equity which the High Courts enforced in the Presidency Towns were those which were being applied by the

Supreme Court of which it was the successor but in its appellate jurisdiction its rule of decision was justice equity and good conscience which had governed the Sadar court

Later High Courts were established in other Provinces of India Till recently however a distinction existed between the powers of the older High Courts in the three Presidency Towns and the newly constituted High Courts The older courts had inherited from the Supreme Courts the common law powers exercised by the Kings Bench Division which included a power to issue a writ of certiorari and other writs within the limits of the Presidency Towns The newer High Courts were not however endowed with this power

The enactment of the Indian Councils Act of 1861 and the establishment of High Courts in various Provinces led to a general reconstitution of almost all civil and criminal courts throughout the country The rule requiring the application in the absence of express provision of the rules of justice equity and good conscience which meant largely an application of the principles of common and English statutory law was embodied in the laws under which the reorganised civil and criminal courts were constituted

The High Courts and the subordinate courts constituted in this manner made a unified system of administration of justice for each of the Provinces till the advent of the Indian Constitution in 1950

As the Companys territories became gradually enlarged by settlement and conquest the Privy Council

as the highest court of appeal from the decisions of the Indian courts became a growing influence in the application of the basic principles of English jurisprudence as the rules of decision all over the country

It was natural perhaps inevitable that the eminent English judges who presided over this tribunal should attempt to solve the problems that came before them wherever Indian regulations or statutes contained no provisions applicable to them by drawing upon the learning on which they had been brought up and the rules and maxims to which they had been accustomed for a lifetime This explains why from the earliest times the decisions of this tribunal in appeals from India have resulted in a steady and continuous grafting of the principles of common law and equity into the body of Indian jurisprudence

The Kings Privy Council is said to have drawn into its own hands for the first time under the Tudor princes the right of the exclusive adjudication of appeals from the foreign and colonial dependencies of the Crown and from the Channel Islands It is said that appeals were first granted from Jersey in Henry VIII s reign and the records of the Privy Council in 1572 present the first instance of the exercise of this jurisdiction The extent and importance of the jurisdiction retained by the Privy Council were pointed out by Lord Brougham in his celebrated speech on law reform in 1828 They determine not only upon questions of colonial law in plantation cases, but also sit as Judges in the last resort of

all prize causes And they hear and decide upon all our plantation appeals They are thus made the supreme Judges in the last resort over every one of our foreign settlements whether situated in those immense territories which you possess in the East where you and a trading company rule together over not less than 70 000 000 of subjects [38]

The first occasion upon which a right of appeal was granted by Royal Charter to the Privy Council from the judgments of the courts in India was in 1726 We have already referred to the Letters Patent of 1726 which constituted the mayors courts in the three Presidency Towns The Charter establishing these courts gave a right of appeal from them first to the Governors in Council and thereafter to the Privy Council in disputes of a specified value Later the Act of Parliament and the Charter which created the Supreme Court of Bengal conferred a similar right of appeal to the sovereign in council Rights of appeal to the Privy Council were also given from decisions of the recorders courts and the Supreme Courts at Madras and Bombay When in 1781 the Governor General in Council or a committee was constituted the Sadar Diwani Adalat and a court of record a similar right to appeal to the Privy Council from the decision of this court was given in matters of a specified value Right of appeal from the Sadar courts of Madras and Bombay to the Privy Council were also given With the amalgamation of the Sadar courts and the Supreme Courts into the High Courts

[38] H Cowell *Tagore Law Lectures* 1872 pp 206 215

in 1862 a right of appeal was given to the sovereign in council from the decisions of the High Courts

We shall have occasion to see how this highest court of appeal composed of distinguished judges powerfully moulded Indian law and even the method of administration of justice in India importing into Indian jurisprudence notions which they had imbibed from their training in English law

III Some Fundamental Principles and Traditions of the Common Law

The Lord Chancellor of England has said that Most of the fundamental principles of our constitutional law that maintain the freedom of the subject and limit the power of servants of the Crown are to be found in the Common Law alone [39] It is said that the adjective common came into use to describe the law common to the whole of England the law by which proceedings in the Kings courts of justice are guided and directed It was to be expected that this system which consisted in applying to new combinations of circumstances those rules which we derive from legal principles and judicial precedents should in course of time come to embrace all the basic principles of the English Constitution Nor was its influence restricted to the sphere of constitutional law Professor Dicey has said that 'Nine tenths of the law of contract and nearly the whole of the law of torts (which are civil wrongs) are not to be dis

[39] Migration of the Common Law (1960) 76 L Q R. p 42

in vogue while others have adopted the system partially and in certain areas A survey of the system as it prevails in the country today was recently made by the Law Commission of India appointed in 1955 It observed that the system had not been adopted over a large part of the country that its application even in areas where it had been adopted was restricted to certain classes of offences and that some parts of the country which had adopted it had decided to discontinue it The Commission expressed its opinion that The system has never become a recognised feature of the administration of criminal justice in the country It expressed the view that trial by jury in India to the extent it exists today is but a transplantation of a practice prevailing in England which has failed to grow and take root in this country They recommended its abolition

In the long history of the development of the common law in India we find instances of some of its practices having failed to take root in the country owing to the difference between English and Indian conditions Perhaps the success of trial by jury in England is due essentially to its being an English institution of antiquity peculiarly suited to the genius of the English people The jury system as practised in England was it is said tried in France for more than a century It is said that It does not work in the Latin countries with their mobile temperament easily moved to pity or hate [40] It is not

[40] Sir Alfred Denning *Freedom under the Law* Hamlyn Lectures p 59

mofussil a question arose in 1870 in the High Court of Bengal whether the power of the Supreme Court to issue writs of habeas corpus was confined to the Presidency Towns or extended to the mofussil The matter depended on a construction of the Charter of 1774 Justice Norman asserted that The most *precious of all rights which a British subject* possesses is the right of personal liberty and if the Charter had contained no words providing any machinery by which that right could be vindicated it could hardly have been said to provide for the due administration of justice in such manner as the condition of the Companys Presidency at Fort William in Bengal required [4] The court decided that The power of the late Supreme Court to issue writs of habeas corpus to persons in the mofussil has been asserted from the time of the promulgation of the Charter to the present day and is admitted in the case of *Re The Bombay Justices* The decision referred to by the court was that of the Judicial Committee of the Privy Council The correctness of the view that the Supreme Court had the power to issue the writ outside the Presidency Towns was questioned in later cases and was finally set at rest by a decision of the Privy Council as late as the year 1943 that the power of the Supreme Court was restricted to persons within the Presidency Towns and extended only to the British subjects in the mofussil [43]

[42] *In the matter of Ameer Khan* (1870) 6 Bengal L R 392 441

[43] *Ryots of Garabandho* v *Zamindar of Parlakimedi* (1943) 70 Ind App 129

various Provinces Since 1923 this statutory writ in the nature of habeas corpus has been available to Indians living in the Presidency Towns as well as the mofussil

The Indian Constitution of 1950 contains a Bill of Rights which provides that no person shall be deprived of his personal liberty except according to procedure established by law The Constitution also empowers the superior courts to issue directions orders or writs including writs in the nature of habeas corpus [45]

This famous common law writ which obtained a foothold in Indian jurisprudence in 1773 has after some vicissitudes enshrined itself in the Constitution of Republican India

The independence of the judiciary

Aungier the Governor inaugurating the Court of Judicature in Bombay in 1672 said Laws though in themselves never so wise and pious are but a dead letter and of little force except there be a due and impartiall execution of them He admonished the judges that You must doe them all Justice even the meanest person of the Island [46] That was the enunciation of a principle which has been the bulwark of the common law the independence and impartiality of the judiciary

In the early days of the Companys settlements the judges were civil servants of the Crown and in the

[45] Indian Constitution Arts 21 32 and 226
[46] Fawcett *op cit* pp 52 55

Governor and Council were combined the executive legislative and judicial functions With the coming of the King s Court the judges gradually became in dependent of the executive being appointed by the Crown In the early days of the Supreme Court the judiciary in the Presidency Towns was put even over the local legislature which then consisted of the Governor and his Council The court was invested with the power of registering the regulations made by the Governor and his Council and it was only the regulations registered by the court which had the effect of laws enforceable in the courts

The *Cossijurah* case an account of which has been given by Sir James FitzJames Stephen[47] and the echoes of which were heard in Parliament towards *the end of the eighteenth century*, tells us of the steps taken by Sir Elijah Impey the Chief Justice of the Supreme Court to enforce the court s process The Zemindar of Cossijurah was sued in the Supreme Court at Calcutta for a large sum of money said to have been lent to him Acting upon an order stated to have been issued by the Company (the executive) that landholders in the mofussil were not subject to the jurisdiction of that court except by their consent the Zemindar took no notice of the process of the court The Zemindar s people beat off the sheriff and his officers when they attempted to take him under a *capias* Thereupon a writ was issued to sequestrate his property to compel appear

[47] J F Stephen *Th S y of Nuncom ar and the Impeach ment of E ih Impey* Vol 2 p 200

ance and the sheriff collected a force of fifty or sixty sailors and others who marched armed from Calcutta to Cossijurah in order to effect their purpose The Governor General in Council ordered Colonel Ahmmuty who was in command of troops at Midnapore to march a force of sepoys against the sheriff s party and arrest them He did so Attempts were made to attach the officer who commanded the troops as for a contempt, but the execution of this process was also prevented by military force Finally actions were brought against Hastings (the Governor General) and the other members of Council individually by the plaintiff in the action against the Rajah of Cossijurah

The merits or the demerits of Impey s part in this encounter between the judiciary and the executive provoked an acute controversy at the time and later in Parliament It certainly was reminiscent of the struggle between the Crown and the courts in England and puts one in mind of the recent event of the dispatch of Federal troops to Little Rock in support of the orders of the Federal Court in the U S A Historians may differ as to the correctness or wisdom of Impey s action but his emphatic assertion of the independence of the judicial process and its inviolability by the executive is indisputable

The history of the administration of justice in India in the early days contains many accounts of successful resistance offered by judges to pressure from those in charge of the administration Indeed

ent judiciary which they erected We shall have occasion to show later how these English traditions now find a place in the Constitution of India which has created an integrated and autonomous judicial system and provided a virtually irremovable judiciary

The adversary system of trial

This established feature of the common law soon took root in India Let us not forget that among the persons who participated in the ceremonial of the opening of the first Court of Judicature at Bombay were The fower Atturneys or Common pleaders on foot The system was not known in India In the Hindu or the Mahomedan system the judge took an active role in eliciting the truth as in the Continental systems The theory of the com mon law that justice can best be achieved by giving each party the fullest opportunity to present his own case was brought into vogue in India by the English The Civil and Criminal Procedure Codes of India and the law of evidence enacted in the latter half of the nineteenth century are in conformity with this common law doctrine It is for the two adversaries to question their witnesses the opposing side having a right to test their testimony by questioning them Throughout the trial the judge is supposed to per form the duty of impartially holding the balance between the two adversaries and ensuring that the proper procedure is being followed His eventual duty is to render his decision at the end of the trial

Equally rigorous is the application in India of the rule of common law which is said to put justice before truth The decision whether in a civil or a criminal trial has to be rendered solely on the evidence put forward by the tribunal It is not open to the judge or the jury to consider matters extraneous to the evidence or let their personal knowledge come into play In a criminal trial the question always is Has the prosecution proved its case on the evidence recorded by the tribunal? The presumption of the innocence of the accused a memorable doctrine of the common law has been accepted by the Indian courts to its fullest extent In a criminal trial the person charged is not obliged to open his mouth or subject himself to questions by the prosecution The burden of establishing him to be guilty rests all the time on the prosecutor and never shifts to the person charged Similarly the question in civil matters is whether the person bringing the claim before the tribunal has established it by legal evidence The Indian judges have repeatedly insisted upon the observance of these rules even though on occasions justice administered in accordance with law may tend to obscure the truth

The system of precedents

The common law has been described as a system which consisted in applying to new combinations of circumstances those rules which we derived from

legal principles and judicial precedents [49] The system of precedents has been a powerful source of the development of the common law in England The Lord Chancellor's Committee on Law Reporting stated that the law of this country consists substantially of legislative enactments and judicial decisions It is today the accepted duty of a judge whatever his own opinion may be to follow the decision of any court recognised as competent to bind him It is his duty to administer the law which that court has declared [50]

The position in India is not different

The Englishmen who presided as judges and practised as barristers in the early days of the courts of the Company and the Crown in India soon started following the English tradition and began to rely on precedents As English law was freely drawn upon in reaching decisions it became customary for these courts to rely on the decisions of the English courts When the Sadar courts the courts functioning for the mofussil started delivering their judgments in English they began to issue as early as 1845 copies of their judgments so that they might be useful as precedents both to the public and the profession These naturally were only some of the judgments delivered by these courts These came to be known as Bengal Sadar Dewani Reports and are perhaps the oldest law reports known in India Later barristers

[49] Lord Wensleydale quoted by Lord Kilmuir in The Migration of the Common Law (1960) 76 L Q R p 42
[50] Para 4

attached to the Sadar courts and some of the judges of these courts published reports of the decisions of the courts The reports of Bellasis Borrodail Marshall and Hyde may be mentioned as some of the reports which owed their origin to the initiative of individual judges and counsel Law reports published in a semi official manner date from the establishment of the High Courts in the three Presidency Towns Numerous series of private reports also soon appeared on the scene

Soon after the establishment of the High Courts Sir James Stephen the then Law Member recorded a minute to the effect that reporting should be regarded as a branch of legislation and accepted the principle that it was hardly a less important duty of the government to publish that part of the law which is enunciated by its tribunals in their judgments than to promulgate its legislation

The doctrine of precedents has been decisively established in Indian jurisprudence Judgments delivered by the superior courts are regarded as much a part of the law of the country as legislative enactments Indeed it has been laid down that even an unreported case may be cited as an authority if the actual decision can be shown from the original sources It is the decision which establishes the precedent and the report but serves as evidence of it [51]

[51] *Vinayak Shamrao* v *Moreshwar* A I R [1944] Nagpur 44

The Supreme Court of India has itself on more than one occasion referred to its unreported judgments[52]

Though the decisions of the High Courts have not been made binding authority by law it is well settled that the courts subordinate to the High Court are bound by its decisions This view is to be found in a number of decisions by the High Courts who have gone so far as to characterise a refusal on the part of the subordinate courts to follow their decisions as insubordination

The Constitution Act of 1935 expressly provided that the law declared by the Federal Court and by any judgment of the Privy Council shall so far as applicable be recognised as binding on and shall be followed by all courts in British India Though the decisions of the Privy Council are no longer binding authority after the Constitution of 1950 they are still persuasive authority of great value and are treated with the highest respect by the Indian courts In regard to the judgments of the Supreme Court of India the Constitution provides that The law declared by the Supreme Court shall be binding on all courts within the territory of India [53]

Recently opinions were expressed that the citation of numerous precedents in which the large number of reports now being published abound impede the speedy and effective administration of justice There upon the question whether the system of precedents

[52] *Baijnath Tripathi v State of Bhopal* A I R [1957] S C 494 496

[53] Indian Constitution Art 141

should continue to be followed in India formed the subject of consideration by the Law Commission of India appointed in 1955 The Commission examined the whole question and came to the conclusion that the system was so bound up with the growth of law and judicial development in India that it was not practicable to go back upon it at the present stage even if the taking of such a step was desirable They also expressed the view that the system of treating decided cases as a source of law and as binding authority had undoubted advantages and emphatically disapproved of any change[54]

The Rule of Law

The fundamental principles of English constitutional law which maintain the freedom of the individual and limit the power of the servants of the Crown derive from the common law The basic principle of the method of the administration of justice asserted as early as the Magna Carta was that no person however great and powerful could disregard the ordinary law of the land The contests between the courts and the Crown in the sixteenth and the seventeenth centuries led to the firm establishment of this principle The result was a government within the bounds established by law The exercise of the powers of government were to be conditioned by law and the subject was not to be exposed to the arbitrary will of the ruler The Rule

[54] Report of Law Commission of India 1958 pp 628 629

of Law means in the words of Dicey The absolute supremacy or predominance of the regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness of prerogative or even of wide discretionary authority on the part of the government [55] It was the common law which brought about the acceptance as unquestionable of 'the principle that anyone—whether a private citizen or high official—who interferes with the person or property of another can be made to answer for his actions before a court of law [56]

We have seen how as far back as 1772 it was announced at the inauguration of the court of justice in Bombay that no government servant that not even the Governor himself was to be above the law We may also recall Regulation III of 1793 which subjected the executive officers of the government acting beyond the law in the discharge of their official duties to the jurisdiction of the courts English practice and tradition gradually developed the principle of the supremacy of the law in India The *Tanjore* case early laid down the principle that while acts of state done by a sovereign power cannot be examined in municipal courts if the act professes to be done under municipal law the courts will have jurisdiction to examine its validity [57] The estab

[55] Dicey *Introduction to the Study of the Law of the Constitution* 9th ed p 202
[56] Lord Kilmuir The Migration of the Common Law (1960) 76 L Q R p 43
[57] *Secretary of State* v *Kamachee* (1859) 7 Moore Ind App 476

lished principle enunciated by the Judicial Committee that the phrase (act of state) as applied to acts of the executive directed to subjects can give no immunity from the jurisdiction of the court to inquire into the validity of the act [58] was acted upon in India and it was uniformly accepted that the Crown could be sued in respect of any executive act done under the municipal law [59] It was recognised that the executive could act only in pursuance of powers given to it by the law Following the well accepted principles of English jurisprudence the courts repeatedly decided that no member of the executive could interfere with the liberty or the property of a subject except on condition of supporting the legality of his action before a court of justice Nor did the judges shrink from deciding issues between the subjects and the executive The doctrine that executive acts done by a sovereign power are amenable to the jurisdiction of the courts and that there is a distinction between such acts and what may truly be described as acts of state has been exhaustively examined and affirmed by the Supreme Court of India [60] The common law remedies of prohibition certiorari and mandamus which have served as powerful aids to the establishment of the Rule of Law could be availed of in the Presidency Towns

[58] *Eshugbayi Eleko* v *Government of Nigeria* [1931] A C 662 671

[59] *Secretary of State for India* v *Hari Bhanji* (1882) I L R 5 Mad 273 *Vijaya Raghava* v *Secretary of State* (1884) I L R 7 Mad 466 478

[60] *Province of Bombay* v *Kusaldas S Advani & Ors* [1950] S C R 621 691 696

As we have seen the remedy of habeas corpus in a statutory form which was at first available only in the Presidency Towns was eventually extended to the mofussil areas

Indeed it has been said that one of the most beneficent results of the association of England with India has been to introduce the Rule of Law into the land and to embed it so firmly into the lives of the people that its displacement seems unlikely in any foreseeable future [61]

IV The Selective Application of English Law

We have seen that over the years English law being founded on justice and right or justice equity and good conscience its application had to conform to Indian circumstances and conditions This necessarily resulted in what may be called a selective application of the English law in India The adoption of the rules of English law by the Indian courts was neither automatic nor uncritical Although they started with a presumption that a rule of English law would be in accordance with the principles of justice equity and good conscience they bore in mind the reservation which was later expressed by the Privy Council in the words if found applicable to Indian society and circumstances [62] In several cases the courts refused to apply the rules

[61] Mr Justice Vivian Bose The Migration of the Common Law (1960) 76 L Q R p 63

[62] *Waghela Rajsanji* v *Shekh Masludin* (1887) 14 Ind App 89 96

of English law on the ground of their being inapplicable to Indian circumstances

As early as 1836 the Privy Council held that the English law incapacitating aliens from holding real property had not been introduced in India[63] Similarly in 1863 they held that the English law of *felo de se* and consequent forfeiture of property did not extend to an Indian resident domiciled at Calcutta[64] In the famous *Tagore* case decided in 1872 they held that English authorities as to the transfer of property were of little or no assistance in India[65] In 1878 the Judicial Committee equally emphatically declared that the distinction in English law between real and personal property did not always obtain in India[66]

Again the Privy Council refused on several occasions to apply the English laws of maintenance and champerty in India They held that these laws are not of force as specific laws in India They were laws said the Judicial Committee of a special character directed against abuses prevalent it may be in England in early times and had fallen into at least comparative desuetude Unless therefore they were plainly appropriate to the condition of things in the Presidency Towns of India it ought not to be held that they had been introduced there as specific

[63] *Mayor of Lyons v East India Company* (1836) 1 Moore Ind App 175 271
[64] *Advocate General of Bengal v Ranee Surnomoye Dossee* (1863) 9 Moore Ind App 391 431
[65] *Tagore v Tagore* (1872) Ind App Supp 47 64
[66] *Dorab Ally Khan v Abdool Azeez* (1878) 5 Ind App 116 126

laws upon the general introduction of British law [67] In more recent days the Judicial Committee has pro nounced that the distinction between indictment and action in regard to what is done on a highway is a distinction peculiar to English law and ought not to be applied in India [68]

The High Courts in India have followed the same trend rejecting the principles of English law when ever they were thought unsuitable to Indian condi tions As early as 1874 the Sunday Observance Acts were held inapplicable to India [69] In 1875 the High Court of Bombay refused to apply the statutes against superstitious uses to Hindu religious endow ments [70] Similarly that court held that the rule in *Shelleys* case did not apply to a disposition by a Parsee [71] The English rule in regard to marriage with a deceased wifes sister has been held not to extend to persons who were not by origin or domicile English [72] Similarly the common law rules as to sur vivorship and special damages in a case of imputa tion of unchastity to a married woman in the mofus sil have been held inapplicable in India [73]

[67] *Raja Rai Bhagwat Dayal Singh* v *Debi Dayal Sahu* (1907) 35 Ind App 48

[68] *Man ur* v *Muhammad* (1924) 52 Ind App 61 67

[69] *Param Shook Doss* v *Rashed Ood Dowlah* (1874) 7 Mad H C R 285

[70] *Kusalchand* v *Mahadev Giri* (1875) 12 Bom H C Rep 214

[71] *Mithibai* v *Limji Nowroji* (1881) I L R 5 Bom 506

[72] *Lopez* v *Lope* (1885) I L R 1. Cal 706

[73] *Webb* v *Lester* (186) 2 Bom H C Rep 52 *Parvathi* v *Manner* (1884) I L R 8 Mad 175

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It is interesting to note the approach of the Indian courts to the doctrine in *Tweddle v Atkinson*.[74] The courts took the view that as the decision was based on a form of action peculiar to the common law courts in England it should not be applied to India and particularly to the mofussil. It was said that the equitable concept of trust to enable a third party to enforce a contract made between others was an instance of the growth of law by means of the dual fiction of trust and agency. Whatever may have been the necessity for the use of such fictions in England there was no reason why courts in India should shrink from a frank recognition of the facts. Jenkins C J said that the administration of justice was not to be hampered by *Tweddle v Atkinson* and that in India courts were to be guided in matters of procedure by the rules of justice equity and good conscience.[75]

What we have noticed illustrates the discrimination which the Indian courts exercised in their prolonged career of judicial legislation based on English law.

V EQUITY AND COMMON LAW

We have noted that there never were in India any separate courts administering equity. The Supreme Courts had both common law and equity jurisdictions. As courts of equity they had power and

[74] (1861) 1 B & S 393 121 E R 762

[75] *Debnarayan v Chunilal* (1914) I L R 41 Cal 137 *Ashutoshbehari v Mangobinda* (1933) I L R 61 Cal 841

authority to administer justice as nearly as may be according to the rules and procedure of the High Court of Chancery in Great Britain In a sense these courts combining both common law and equity jurisdictions brought about in advance the fusion of law and *equity jurisdictions which was effected in England* by the Judicature Act of 1873 In England the Judicature Act did not fuse the two systems of rules[76] In India however law and equity were always treated as part of the same system We have seen how the principles of English law came to be administered particularly in the mofussil as justice equity and good conscience In the application of this formula the courts drew liberally both upon English common law as well as English equitable doctrines In effect what was applied in India was common law as liberalised by equity In India equity worked through and not in opposition to the common law

In England an equitable right or estate is recognised as something different from a legal right or estate The interest of a beneficiary in trust property is in England an equitable interest while the legal interest in the estate is in the trustee Again in England if a person agrees to sell land he creates in the buyer an equitable interest in the land These equitable interests were the creation of the Court of Chancery The law in India never recognised any distinction between legal and equitable interests As early as 1872 the Privy Council said The law of

[76] Holdsworth *Some Makers of English Law* p 208

India speaking broadly knows nothing of the distinction between legal and equitable property in the sense in which it was understood when equity was administered by the Court of Chancery in England "[77] The same position was reiterated by that court in 1931 when it said that by the law of India There can be but one owner and where the property is vested in a trustee the owner must their Lordships think be the trustee [78]

It is not surprising therefore that some of the peculiar equitable doctrines were not found acceptable by the Indian courts They held that provisions in favour of children or other persons for their advancement were unknown among Indians The general law of succession in India the Indian Succession Act did not enact the rule of English law by which a child who had received a benefit must account for it on a distribution when a father dies intestate The rule has however been held to apply to persons subject to English law in India [79] The equity of part performance which in England mitigated the rigour of the Statute of Frauds by taking a parole contract out of it when it had been partly performed seemed at one time to apply to India to the extent of taking away the application of the laws requiring registration and other formalities in such cases [80] The doctrine has now been in

[77] *Tagore v Tagore* (1872) Ind App Supp 47 71
[78] *Rani Chhatra Kumari v Mohan Bikram* (1931) 58 Ind App 279 297
[79] *Kerwick v Kerwick* (1920) 47 Ind App 275
[80] *Mahomed Musa s Case* (1914) 42 Ind App 1

a partial form incorporated into the statute governing transfer of property[81]

However the statute law of India has incorporated in itself to a substantial extent equitable rules and doctrines The Indian Trusts Act of 1882 embodies in a concise form the whole structure of trusts built up by the equity courts in England In order to clarify the principles enacted in the sections illustrations have been appended to some of them which in many cases are based on English decisions The Act also deals with certain obligations in the nature of trusts These are attempts to enumerate broadly circumstances under which a person may be placed in the position of a trustee in reference to another These obligations in the nature of trusts are no different from the implied and constructive trusts found in the decisions of the English equity courts

Another instance of an almost bodily transplantation of the doctrines of English equity courts is to be found in the Specific Relief Act of 1877 It deals with cases in which courts will order restitution of specific property and order contracts to be specifically performed It also enumerates the circumstances in which the courts will grant the relief of rectification and cancellation of instruments The Act is in a sense a blend of common law and equity inasmuch as it also makes provision in a qualified manner for the writ of mandamus in certain cases This statute powerfully illustrates how those who were charged with the task of drawing suitable codes for India

[81] Transfer of Property Act 188° s 53A

discarded the distinction between law and equity in English jurisprudence not hesitating to include in an Act dealing mainly with the equitable relief of specific enforcement a remedy in the nature of the Crown writ of mandamus

VI Indian Common Law

Common law consists as we have seen of customary rules of the realm recognised by the courts In that sense every country can be said to have its common law rules of conduct which apply to citizens generally and the rights and privileges which they can enjoy Some of these customary rules prevailing in India have come to be known as the Indian common law

The right to a public highway is recognised in India as in England as the common law right of the citizen Anyone in India can set up a ferry on his own property and take toll from strangers for carrying them across[8] Similarly the Indian courts have recognised the right to a fishery in a tidal and navigable river in Bengal[83] As instances of other Indian common law rights may be mentioned the right of burial and with it the right to perform all customary rites the right to worship in a mosque or temple and the right to take out religious proces

[82] *Maharaja Sir Luchmeswar* v *Sheik Manowar* (1891) 19 Ind App 48 55
[83] *Sirnath* v *Dinabandhu* (1914) 41 Ind App 221 245

sions[84] The Indian courts have also recognised as a common law right a right to have access to courts of law if a person can show a cause of action[85]

VII Conclusion

We have examined the factors which led to the application and growth of the English law in India It was almost directly introduced in the Presidency Towns of Calcutta Madras and Bombay In the greater part of the country it obtained its sway in the guise of the principles of equity justice and good conscience Then followed the regulations made in the Provinces from time to time and the magnificent structure of the Indian Codes erected in the latter half of the nineteenth century The Codes embodied in the main the principles of English law simplified and modified to suit Indian conditions Some of the Indian statutes made express provision for the application in India of principles and rules enforced by the English courts for the time being[86] A prolific source of the incorporation of English principles into Indian jurisprudence were the decisions of the Indian courts Notwithstanding the enactment of the codes there still remained extensive tracts which had not been covered by the codified law As an example one may refer to the vast field of civil wrongs With no rules whatever to

[84] *Ramrao* v *Rustum Khan* I L R (1901) 26 Bom 198 *Md Washi* v *Bachhan Sahib* A I R (1905) All 68 *Manzur* v *Muhammad* (1924) 52 Ind App 61
[85] *Jagannatha* v *Kathaperumal* A I R (1927) Mad 1035
[86] Indian Divorce Act 1869 s 7

guide them in such tracts the Indian courts followed as far as circumstances would permit the trail of the English statutes and English decisions Even in fields covered by the codes it was obvious that the codes could not by their very nature cover all situations and cases which might arise They laid down general rules which would need interpretation and perhaps some modification in their application to particular cases The courts applying the general rules embodied in the codes to new situations would naturally look for assistance to cases decided on similar situations in England Where the language of the code was clear and applicable no question of relying upon English authority would arise But very often the general rule in the Indian Code was based on an English principle and in such cases the Indian courts frequently sought the assistance of English decisions to support the conclusions they reached They could not do otherwise for not only the general rules contained in the codes but some of the illustrations given to clarify the general rules were based on English decisions

Frequently there arose questions of the interpretation of these codes There again the rules and maxims of interpretation laid down by the English courts were helpful and were largely followed

In the words of Sir Henry Maine[87] The higher courts while they openly borrowed the English rules from the recognised English authorities constantly used language which implied that they believed them

[87] *Village Communities* pp 298 299

selves to be taking them from some abstract body of legal principle which lay behind all law and the inferior judges when they were applying some half remembered legal rule learnt in boyhood or culling a proposition of law from a half understood English textbook no doubt honestly thought in many cases that they were following the rule prescribed for them to decide by equity and good conscience wherever no native law or usage was discoverable

Thus have the concepts principles rules and traditions of English law penetrated into Indian jurisprudence and the fabric of the judicial system of India *The process continues to this day* *One* has only to look at any volume of the reports of the High Courts or the Supreme Court of India to see that English precedents and recognised English text books are freely cited and relied on by these courts

Chapter 2

CIVIL LAW

The first Law Commission of which we have already spoken reasoned that in every country there ought to be a law which is prima facie applicable to every person in it though British India may appear on the one hand to have less need of a *lex loci* than any other country because the great mass of its population consists of two sects whose law is contained in their religion yet on the other hand there is probably no country in the world which contains so many people who if there is no law of the place have no law whatever [1] On this was founded the decision to enact in India laws which were to be territorial in their application It was not however suggested that the personal laws of Hindus or Mahomedans should be taken away The territorial law was to be restricted to law applicable to all inhabitants of the country alike

The labours of the first Commission which we shall have occasion to refer to later were solely devoted to the preparation of a general criminal code for the country

After the Charter Act of 1853 a new Commission was appointed which had among its members Sir John Romilly Sir Edward Ryan and Messrs Came

1 Quoted in Rankin *Background to Indian Law* pp 34 35

ron and Macleod to whom we shall have occasion to refer later and Mr T F Ellis The second report of this Commission submitted in December 1855 dealt with the wants of India in respect of substantive civil law [2] In its short life of three years the Commission which had made this recommendation could not attempt to complete such an edifice as they projected or even to lay its foundations but they did a great work when they laid out the scheme On December 14 1861 a commission was issued to certain persons for the purpose of preparing a body of substantive civil law for India and they were directed to do so on the principles laid down by the Report of 1855 This set on foot the work of drafting [3] the great Indian civil codes which were to follow in fairly quick succession

LAW OF SUCCESSION

The year 1861 saw the acceptance by the Government of the policy laid down in the Commission s second report of December 1855 The new Commissioners appointed in that year were requested to make separate reports on each branch of the civil law that they dealt with from time to time From the discussions which had preceded their appointment it was plain that the law most urgently required for persons other than Hindus and Mahomedans was a law to regulate the devolution of property on death This had been the topic which had called forth

[2] *Ibid* p 42 [3] *Ibid* pp 44 45

the attempt on the part of the country courts to ascertain in the best manner they could what was the law of the country of the parties before them

The draft which with little change became the Indian Succession Act of 1865 was submitted on June 23 1863, in a unanimous report signed by Sir John Romilly (Lord Romilly Master of the Rolls) Sir William Erle (Chief Justice of the Common Pleas) Sir Edward Ryan Mr Robert Lowe (Lord Sherbrooke) Mr Justice Willes and Mr J M Macleod the last mentioned having been one of the Indian Law Commissioners of Macaulay s time [4]

Sir George Rankin refers to the draft as a most valuable and distinguished piece of work carried out by a body of real experts who devoted their knowledge and abilities to the cause of clearness and simplicity, and took right and bold decisions on major questions of principle Archaisms were rigidly eschewed. [5]

The scheme of the Act may be described in brief

Marriage by itself was not to have any effect in changing the ownership of property of a party The distinction made in English law between real and personal property was to have no place in it That distinction which had in substance resulted in a double law of succession in England and led to technicalities was obviously unsuitable to Indian conditions The Act had no doubt to make a distinction between movable and immovable property of deceased persons for certain purposes The same rules

[4] *Ibid* p 46 [5] *Ibid* p 47

were however, to apply to the succession to both kinds of property Testamentary succession was not known to Hindu law But the practice of making testaments had come into existence at the commencement of the British rule and even earlier in the Presidency Towns The origin of this practice can perhaps be traced to Indians coming into contact with Englishmen who were accustomed to make testaments The will of a Hindu appears to have first come before the courts in 1786.[6] The Succession Act recognised wills and required them to be in writing and signed and attested by two witnesses But the formalities laid down were not as strict as those provided in English law The Act required a grant of a probate or letters of administration for the purpose of representation to the estate of a deceased person and as authorising the administration of his property A duty was laid on the executor to pay the funeral and testamentary expenses of the deceased and all his debts in so far as the assets would permit The perpetuity limit laid down in the Act was the lifetime of one or more persons living at the testator's death and the minority of some person who was to be in existence at the expiration of that period and to whom if he attained full age the thing bequeathed was to belong A bequest to a person not in existence at the death of the testator was made void if it was subject to a prior bequest unless it comprised the whole of the remaining interest of the testator in the thing be

[6] *Munno Lal* v *Gopu Dutt* (1786) Montr 290

queathed Directions for accumulation were valid only if they operated for one year after death Bequests to religious and charitable objects could only be made by a will executed not less than a year before a person s death and deposited within six months of its execution with the Registrar when the deceased person had left near relations

Thus was enacted a system of succession which was to apply to all who were not expressly exempted from it Hindus and Mahomedans and Buddhists were in terms excepted from the operation of the Act and authority was given to exclude from its operation other sections of the Indian community Thus the Act applied only to Europeans Eurasians Jews Armenians and Indian Christians excluding from its operation the majority of the inhabitants of the land It was however the general law of the land applicable to the devolution of all property in British India and also to all movables outside British India of persons domiciled in British India

At the time of the passing of the Act it was hoped that its provisions relating to testamentary disposition might be applied generally to all In 1870 came legislation which applied its provisions in regard to wills to Hindu wills executed in the Presidency Towns Gradually as the practice of making wills spread among the Hindus in the mofussil these provisions were extended to other areas

A further step was taken by the enactment of the Probate and Administration Act of 1881 which applied to Hindus as well as Mahomedans About

fifty years later came the Indian Succession Act of 1925[7] which consolidated the general law of India applicable to intestate and testamentary succession repealing the Acts of 1865, 1870, 1881 and several other Acts. That statute constitutes the general law of succession in India but its operation does not yet extend to those who are governed in these matters by their personal laws of succession such as Hindus and Moslems.

Some of its provisions such as those concerning the making of testaments apply to Hindus. Its provisions relating to representation to the estate of deceased persons are of general application. Since 1956 the Hindus who constitute the vast majority of the Indian population have been governed in matters of succession by a special code.[8] The Mahomedans still retain their uncodified law of succession.

The concept of domicile for the purpose of succession laid down in the Indian Succession Act is substantially the same as in England.[9] The manner provided for the execution of unprivileged wills is based on the English statute of 1837 with a slight variation.[10] The principles enacted in the Act for the interpretation of wills have, it is said, been formulated with the aid of a book published in England in 1863.[11]

[7] Act 39 of 1925
[8] Hindu Succession Act 30 of 1956
[9] Act 39 of 1925 ss 5 to 18
[10] *Ibid* s 63 Wills Act 1837 s 9
[11] Francis Vaughan Hawkins *Construction of Wills* Rankin *op cit* p 49

However the rule based on English practice and habits of thought that in construing a will the court should lean against intestacy has not been applied to Indian wills[12] Similarly the doctrine of children s advancement based on English ideas has been ex pressly negatived by the Act[13]

The courts in India accustomed to resort to English decisions when doubts arose occasionally applied rules of interpretation laid down in the English cases in construing wills in the Indian language The Judicial Committee of the Privy Council had to intervene and point out that to search and sift the heaps of cases on wills which cumber the English Law Reports in order to under stand and interpret the wills of people speaking a different tongue trained in different habits of thought and brought up in different conditions of life seemed almost absurd[14] On other occasions the Judicial Committee had to insist on the Indian courts being guided by an examination of the Indian statutes governing the matter rather than entering upon the unprofitable task of discovering the law from English decisions based on somewhat different rules

Though the Indian statutes dealing with the law of testamentary and intestate succession have to a large extent embodied the principles of English law they

12 *Venkata Narasimha Appa Row* v *Parthasarathy Appa Row* (1913) 41 Ind App 51 71
13 Act 39 of 1925 s 47
14 *Narendra Nath Sircar* v *Kamalbasini Dasi* (1896) 23 Ind App 18 26

have also taken a different course in many important matters It would perhaps be correct to state that the Indian legislature has by degrees evolved an in dependent system of its own largely suggested no doubt by English law but also differing much from that law and purporting to be a self contained system [15]

CONTRACTS

The Report of the Commission made in 1855 had among other things stated We see no reason however why on very many important subjects of Civil Law—we shall only name one contracts as an example—such law cannot be prepared and enacted as will be no less applicable to the transactions of Hindoos and Mahomedans by far the most numer ous portions of the population than to the rest of the inhabitants of India [16]

The Commission which changed in personnel after it had submitted its draft of the law of succession was ready with the draft of the law of contract in 1866 The subject appears to have been selected as it had afforded the most frequent occasion for litiga tion in India

Sir Frederick Pollock who had the occasion to study the draft when he later wrote his commentary on the Indian Contract Act in 1905 had high praise for the

[15] *Mirza Kurratulain* v *Peara Saheb* (1905) 32 Ind App 244 257 258 *Ramanandi Kuer* v *Kalawati Kuer* (1927) 55 Ind App 18 23

[16] Quoted in Rankin *op cit* p 88

work done by the Commission. In his view the draft prepared in England by the Indian Law Commission was uniform in style and possessed great merit as an elementary statement of the combined effect of common law and equity doctrine as understood about forty years ago.[17] Equally appreciative was Sir Henry Maine who introduced the Contract Bill in the Legislative Council in 1867. He said: "Their draft will be found to consist of the English law of contract much simplified and altered in some particulars so as to accommodate it to the circumstances of this country. . . . It may be said of these proposed modifications of English law that while all or nearly all of them have commended themselves to the approval of enlightened lawyers, not a few are being gradually carried out in England without the aid of the legislature through the direction given of late years to the current of judicial decision."[18]

The Bill as introduced contained, however, some clauses relating to specific performance which evoked considerable opposition both in England and India. Indeed this opposition brought about the resignation of Lord Romilly and his colleagues in 1870 and the Contract Bill remained before the Legislative Council from 1867 to 1872.

During this period the Commission's draft appears to have been "revised and in parts elaborated by the Legislative Department of India." The borrowing from

17 Pollock and Mulla, *Indian Contract and Specific Relief Acts*, 8th ed., Preface, p. vii.
18 *Statement of Objects and Reasons*, July 9, 1867, quoted in Rankin, *op. cit.*, p. 94.

the New York draft Code seems to belong to this phase Lastly Sir James Stephen made or supervised the final revision and added the introductory definitions which are in a wholly different style and not *altogether in harmony with the body of the work* [19] The sections borrowed from the draft Civil Code of New York were described by Sir Frederick Pollock as an infliction which the sounder lawyers of that State have been happily successful so far in averting from its citizens Notwithstanding these changes however in his words it was much to the credit of the workmen that the result after allowing for all drawbacks, was a generally sound and useful one [20]

The Act deals in its first chapter headed Of the communication acceptance and revocation of proposals with the basic principles underlying the formation of contracts It proceeds in the next chapter to tell us what agreements are contracts and what persons are competent to contract The same chapter deals with contracts which are voidable and void agreements We have next the subject of contingent contracts Another chapter deals with the performance of contracts laying down among other things by whom contracts must be performed and the time and place of performance It also deals with contracts which need not be performed The Code also deals with quasi contracts which it calls Certain relations resembling those created by contract It provides

[19] Pollock and Mulla *Indian Contract and Specific Relief Acts* 8th ed Preface p vii
[20] *Ibid* p vii

in a chapter headed The consequences of a breach of contract" the measure of compensation for loss or damage caused by the breach It dealt also with the law of the sale of goods and partnership but the Indian legislature repealed the sections dealing with these subjects when it enacted the Indian Sale of Goods Act in 1930 and the Indian Partnership Act in 1932 The Act also deals with contracts of indemnity and guarantee bailment bailments by way of pledge and agency It is thus a fairly comprehensive attempt to deal with all aspects of this branch of the law

Yet its preamble states that it is an attempt only to define and amend certain parts of the law relating to contracts, The courts have held that the Act is not a complete code dealing with the law of contracts"[1] and have in the absence of specific provisions in the Act frequently applied principles of English common and statute law and the decisions of English courts In cases for which no relevant provision is found in the Contract Act or other enactments relating to contracts the courts have even applied rules of Hindu and Muslim law of contracts to Hindus and Muslims As an instance may be mentioned the rule of the Hindu law of contract known as *damdupat* which prevents interest exceeding the amount of the principal being recovered at any one time This rule is still in force in the areas which constituted the former Bombay Presidency and in the

[1] *Irrawaddy Flotilla Co Ltd* v *Bugwandass* (1891) 18 Ind App 121 129

Presidency Town of Calcutta Well recognised customs and usages of trade have also been saved by the provisions of the Act and have in the absence of any inconsistent provision in the Act been applied by the Indian courts[2]

CONSIDERATION

It is interesting to examine some aspects of the law of consideration formulated in the Act and compare them with the English common law

Consideration is defined in section 2 (*d*) of the Act as follows When, at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing or promises to do or to abstain from doing something such act or abstinence or promise is called a consideration for the promise

The language of the definition would suggest as pointed out by Whitley Stokes[23] that in India consideration need have no value The fundamental rule of the English common law is that consideration is something which not only the parties but the court can regard as having some value The principle may be broadly expressed thus The law will not enforce a promise given for nothing and if it is apparent to the court on the face of the transaction that an alleged consideration amounts to nothing (not merely to very little) then there is no foundation for the promise and we say either that there is

[2] Indian Contract Act 9 of 1872 s 1
[23] *Anglo Indian Codes* Vol 1 p 497

not any consideration or that there is an unreal consideration. The Act does say in section 10 that agreements are contracts, i.e., enforceable if they are (amongst other conditions) made for a lawful consideration. In section 23 it is declared that certain kinds of consideration are not lawful. In section 25 agreements made without consideration are declared (special exceptions excepted) to be void. It is not anywhere stated in terms that consideration is not lawful or otherwise not sufficient if it is not good or valuable in the sense which those terms bear in English law.[24] Notwithstanding the absence however of a specific provision that the consideration must be a valuable consideration it does not appear that the Act intended to abrogate the fundamental common law rule.

Consideration may under the Act move from a person other than the promisee. The definition expressly so states. It has been held by the courts that this is a deliberate departure from the English law which provides that consideration cannot lawfully move from a person other than a promisee.

The Indian law also recognises a consideration antecedent to the promise. There would be a consideration for a promise if the promisee or any other person has done or abstained from doing something. Past consideration has been held in India to be good consideration. The common law rule however is that the promise and the consideration should be simultaneous. The consideration must always be

[24] Pollock and Mulla *op cit* pp 32 33

present at the time of making the promise and there is no such thing as past consideration [25] The Indian law seems in this respect to have adopted the rule laid down in the English case of *Lampleigh v Braithwaite* decided in 1615 [26]

Under the Indian law consideration is necessary to the validity of an agreement except in certain cases An agreement made without consideration will be valid in India if it is made out of natural love and affection between parties nearly related provided the agreement is in writing and registered It will also be valid without consideration if it is a promise to compensate a person who has voluntarily done some thing for the promisor or something which the promisor was legally compellable to do [27] If A promises to give B a sum of money for having found his lost purse or his lost dog the promise would be valid though without consideration A having acted voluntarily Similarly if A promises to compensate B for having maintained A s infant son whom A was legally compellable to maintain the promise would be valid though without consideration A promise to pay a debt which is barred by limitation would also be valid though without consideration [28] The rule of English law that a contract in the form of a deed is valid though there be no consideration for it does not find a place in Indian law

[25] *Ibid* p 25
[26] 1 Sm L C 11th ed 141
[27] Indian Contract Act s 25 (1) and (2)
[28] *Ibid* s 25 (3)

In its Thirteenth Report made in 1958, the Law Commission of India had occasion to consider the modern attitude towards the doctrine of consideration which has been described by Professor Holdsworth as something of an anachronism. It was pressed upon the Commission that the working of the doctrine has resulted in injustice in many cases and that it should be abolished or at any rate modified. The Commission examined the Report of the Law Revision Committee in England made in 1937 and its conclusion that the law should be modified so that a contract should exist if there was an intention to create legal relations and if either the contract was reduced to writing or consideration was present. It also examined the report of New York Law Revision Commission which had been constituted at about the same time as the English Law Revision Committee and which had reached conclusions in many respects similar to those of the English Committee. The Commission, however, felt themselves unable to recommend the abolition of the doctrine. They said: "It has become so firmly rooted in our concept of contract that a wholesale rejection of the doctrine would have the result of overturning the very structure on which our Law of Contract is based and would require a complete and thorough overhaul of the law. This in our opinion is hardly warranted by the circumstances."[29] The conclusion reached by the Commission was that the exceptions found in the Indian law to the requirement of con-

[29] *Law Commission of India 13th Report* p. 6

sideration should be enlarged and they specified some cases to which these exceptions may be extended

Under the Indian law all agreements are contracts if they are made for a lawful consideration and with a lawful object [30] A consideration or object of an agreement is lawful unless it is forbidden by law or it would defeat the provisions of any law or is fraudulent or involves injury to the person or property of another or the court regards it as immoral or opposed to public policy Every agreement of which the object or consideration is unlawful is in Indian law void [31] In determining the application of the statutory concepts embodied in the words forbidden by law or immoral or opposed to public policy the Indian courts have frequently derived help from the English common law Recently the Supreme Court of India considered English decisions when a question arose whether a partnership formed for the purpose of carrying on a business in differences was unlawful within the meaning of the Indian provision [32]

WAGERING CONTRACTS

In regard to contracts by way of wager the Indian and the English law seem to have run on parallel lines At common law wagers were not illegal and before the enactment of the English Gaming Act of

[30] Indian Contract Act s 10
[31] *Ibid* s 23
[32] *Gherulal Parakh* v *Mahadeodas* A I R (1959) S C 781

1845[33] actions used to be brought and maintained to recover money won upon wagers[34] In India the position was the same before the enactment of the Indian Act for Avoiding Wagers[35] The law that prevailed in British India was the common law of England So it was held by the Judicial Committee of the Privy Council[36] Notwithstanding the Gaming Act of 1845 wagering contracts were not illegal in England The Act had merely rendered them void and unenforceable at law Thus though the primary agreement of wager would be void an agreement collateral to it remained valid and enforceable The law in India continued to be the same except in the Presidency of Bombay where the Bombay Wagers (Amendment) Act 1865 anticipated the English Gaming Act of 1892 and rendered even collateral agreements void The Indian Contract Act of 1872 having been based on the English Gaming Act of 1845[37] did not however incorporate the provisions of the Bombay Act so that except in Bombay contracts collateral to wagering contracts remained valid and enforceable Later the wide and comprehensive phraseology of the Gaming Act of 1892 rendered even collateral contracts void in England[38]

33 8 & 9 Vict c 109
34 *Read* v *Anderson* (1882) 10 Q B D 100 104
35 Act 21 of 1848
36 *Ramloll Thackoorseydass* v *Soojumnull Dhondmull* (1848) 4 Moore Ind App 339 *Chotayloll* v *Manickchund* (1856) 6 Moore Ind App 251
37 8 & 9 Vict c 109 s 18
38 *Saffery* v *Mayer* [1901] 1 K B 11

The position in India however has remained unaltered in regard to contracts collateral to wagering contracts

PUBLIC POLICY

The development of the doctrine of public policy which is rooted in the common law and which is embodied in section 23 of the Indian Contract Act appears to have run on somewhat divergent lines in England and India The doctrine has been thus explained Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy It seems however that this branch of the law will not be extended The determination of what is contrary to the so-called policy of the law necessarily varies from time to time Many transactions are upheld now which in a former generation would have been avoided as contrary to the supposed policy of the law The rule remains but its application varies with the principles which for the time being guide public opinion [39] The courts in England have held that the rules of public policy are well settled and that the function of the courts is only to expound them and apply them to varying situations Lord Halsbury went so far as to say that the categories of public policy were closed and could not be enlarged [40] Though Lord Atkin characterised the dictum of

[39] Halsbury *Laws of England* 3rd ed Vol 8 pp 130 131
[40] *Janson v Driefontein Consolidated Mines* [1902] A C 484 491

Lord Halsbury as too rigid he took care to lay down that the doctrine should be invoked only in clear cases in which harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds [41] In India the powers conferred on the courts by the statute are very wide The language of the statute expressly states that it is for the court to decide whether it regards the consideration or object of an agreement as opposed to public policy The courts have therefore while accepting the observations of the English judges that public policy is an unruly horse and an illusive concept refused to adopt the view that the categories of public policy are closed and that the courts cannot proceed to decide on new heads of public policy. The Indian view was thus expressed in a Bombay judgment It is no doubt open to the court to hold that the consideration or object of an agreement is unlawful on the ground that it is opposed to what the court regards as public policy This is laid down in section 23 of the Indian Contract Act and in India therefore it cannot be affirmed as a matter of law as was affirmed by Lord Halsbury that no court can invent a new head of public policy But the dictum of Lord Davey in the same case that public policy is always an unsafe and treacherous ground for legal decision may be accepted as a sound cautionary maxim in considering the reasons assigned by the learned judge

[41] *Fender v St John Mildmay* [1938] AC 1 11

for his decision[42] Other Indian decisions have adopted this view

An attempt was made in India to attack the validity of contracts collateral to wagering contracts on the ground that they were opposed to public policy The highest court in India rejected the argument in these words The Common Law of England and that of India have never struck down contracts of wager on the ground of public policy indeed they have always been held to be not illegal notwithstanding the fact that the statute declared them void Even after the contracts of wager were declared to be void in England collateral contracts were enforced till the passing of the Gaming Act of 1892 and in India except in the state of Bombay they have been enforced even after the passing of the Act 21 of 1848 which was substituted by section 30 of the Contract Act[43] In effect the court refused to evolve a new head of public policy by pronouncing wagers to be opposed to public policy

MISTAKE

The concept of mistake resulting in legal consequences is in Indian law somewhat different from that in English law

In England it is well established in equity as well as at law that money paid under a mistake of law with full knowledge of the facts is not recoverable

[42] *Shrinivasdas* v *Ramchandra* (1919) I L R 44 Bom 6 20
[43] *Gherulal Parakh* v *Mahadeodas* A I R (1959) S C 781 796 797

and that even a promise to pay upon a supposed liability and in ignorance of the law will bind the party [44] The position in the United States and in Australia would appear to be the same it having been held that moneys paid voluntarily *in the sense* that they are paid without compulsion or extortion or the exercise of undue influence and with a knowledge of the facts cannot be recovered although paid without any consideration [45]

The Indian Act provides that a person to whom *money* has been paid or anything delivered by mistake must repay *or return it* [46] The word mistake has been used without any qualification or limitation and has been held to comprise in its scope a mistake of law as well as a mistake of fact The legal position was clarified by a recent decision of the Supreme Court of India A business firm had deposited certain sums with the Tax Authority in the belief that they were payable as dues in respect of sales tax Subsequently the levy of the tax was held to be invalid Thereupon the firm sued the taxing authority for the repayment of the moneys deposited as tax In granting relief the court stated 'There is no warrant for ascribing a limited meaning to the word mistake it is wide enough to cover not only a mistake of fact but also mistake of law

The mistake lies in thinking that the money paid

[44] Pollock *Principles of Contract* 13th ed pp 366 374 Leake *Principles of the Law of Contract* 6th ed p 63

[45] Willoughby *The Constitution of the United States* Vol I p 12 *Werrin* v *The Commonwealth* 59 C L R 150

[46] Indian Contract Act s 72

was due when in fact it was not due and that mistake if established entitles the party paying the money to recover it back from the person receiving the same No distinction can be made in respect of tax liability and any other liability on a plain reading of the terms of section 72 of the Indian Contract Act even though such a distinction has been made in America [47]

FRUSTRATION OF CONTRACT

The doctrine of frustration of the contract which has given rise to divergent theories in England is governed in India by a statutory provision

By the common law a man who promises performance without qualification is bound by the terms of his promise if he is bound at all The view has been taken that if parties did not mean their agreement to be unconditional they ought to have attached to it such conditions as they thought fit However a condition need not always be expressed in words Some conditions may be implied from the nature of the transaction In certain cases where an event making performance impossible is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made performance or further performance of the contract is excused [48]

[47] *Sales Tax Officer Banaras* v *Kanhaiya Lal Makand* A I R (1959) S C 135 141 142 see also *Sri Sri Shiba Prasad Singh* v *Maharaja Srish Chandra Nandi* (1949) 76 Ind App 244

[48] *Baily* v *De Crespigny* (1869) 4 Q B 180 185

The English view is based on three principal theories The classic theory historically the oldest is that of an implied term imputed by law to the parties to regulate a situation which they would have regulated had they thought of it The second theory is that the doctrine applies where the basis or the foundation of the contract has disappeared The third theory usually attributed to Lord Wright and which his Lordship freely admitted to be somewhat heretical is that the doctrine is invented by the court to supplement the defects of the actual contract Generally speaking it makes little practical difference which theory is adopted Lord McNair suggests that the three theories can be reconciled He regards the second theory of the disappearance of the basis of the contract as really an inference of fact drawn by the court and upon which the court bases the implication of a term to meet the case where the parties must have foreseen the possibility of occurrence and yet have not provided against it As for the third theory that the court determines what is just the same result is achieved under the first theory by imputing the missing term to the parties English judges favour the implied term theory [49]

In India there is no room for the formulation of a theory because the terms of the statute are wide enough to include a case of frustration of contract The Act provides that a contract to do an act which after the contract is made becomes impossible or by reason of some event which the promisor

[49] Pollock and Mulla *op cit* p 515

could not prevent unlawful, becomes void when the act becomes impossible or unlawful [50] After examining the different theories formulated in the judgments of the English courts the Supreme Court of India observed *These differences in the way of* formulating legal theories really do not concern us so long as we have a statutory provision in the Indian Contract Act In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in section 56 of the Contract Act taking the word impossible in its practical and not literal sense It must be borne in mind however that section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties Here there is no question of finding out an implied term agreed to by the parties embodying a provision for discharge because the parties did not think about the matter at all nor could possibly have any intention regarding it When such an event or change of circumstances occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole it is the court which can pronounce the contract to be frustrated and at an end The court undoubtedly has to examine the contract and the circumstances under which it was made The belief knowledge and intention of the parties are evidence but evidence only on which the court has to form its own conclusion whether the changed circumstances destroyed altogether

[50] Indian Contract Act s 56

the basis of the adventure and its underlying object

This is really a rule of positive law and as such comes within the purview of section 56 of the Indian Contract Act [31]

We have referred only to some of the modifications of the English law which the makers of the Indian Code worked into the Indian Code to make it con form to the conditions obtaining in India

Notwithstanding these modifications Sir Frederick Pollock observed a tendency in Indian courts to follow English authorities too literally (though in any case they are not positively binding on Indian courts) considering only what the courts actually decided in England and not what they would have decided if their office had been to apply the principles of the common law to the facts of Indian society The best way he said to counteract such a tendency is not to neglect the letter of English judgments which is not practicable and would not be useful but to enter more fully into their spirit and distin guish their permanent from their local and accidental elements [32]

Notwithstanding some of its defects referred to earlier the Indian Contract Act of 1872 has like most of the Anglo-Indian Codes served its purpose usefully and well We have already referred to the suggestions for its revision recently made by the Law Commission of India Among other changes the Commission has

[31] *Satyabrata Ghose v Mugneeram Bangur & Co* (1954) S C R 310 322 324

[32] Pollock and Mulla *op cit* Preface

suggested the modification of the doctrine that a party to the contract can alone sue to enforce it and also a provision to give effect to the doctrine of unjust enrichment or 'unjust benefit on the basis of the circumstances giving rise to a quasi contract

SALE OF GOODS AND PARTNERSHIP

The chapter in the Act dealing with the sale of goods which was later repealed represented as was said when the Bill was introduced the English law on the subject disembarrassed of the inexpressible con fusion and intricacy which is thrown on every part of it by the vague language of the Statute of Frauds [53] Conditions in India rapidly changed after the passing of the Contract Act in 1872 and the provisions in regard to sale of goods were found to be inadequate The English law relating to the sale of goods which was the basis of the Indian law as enacted in 1872 had itself passed through important changes and was codified in 1893 [54] The legislation in England dis carded some of the old common law rules and adapt ed others to suit them to the practices and conditions of modern trade The important colonies and over seas dominions enacted laws which were in substance adaptations of the English Sale of Goods Act It appears that a number of states in the United States enacted in 1906 a uniform Sales Act based very largely

[53] Quoted in Rankin *op cit* p 95
[54] Sale of Goods Act (56 & 57 Vict c 71)

on the English Act The virtual adoption of the English statute in other countries indicated that its provisions were eminently suited to the needs of modern trade and commerce Indeed the English statute was characterised by Lord Parker as a very successful and correct codification of this branch of the mercantile law [55] India followed the example of England and the other countries and enacted in 1930 the Indian Sale of Goods Act which is said to restate minutely and fully what had been enacted by the English Sale of Goods Act of 1893 The English provisions were carefully scrutinised in the light of the decisions after 1893 and where the decisions showed the provisions to be defective or ambiguous the Indian law attempted to improve upon them The Special Committee which was appointed to examine the provisions of the Indian Sale of Goods Bill expressed the hope in its Report that the adoption of the English Act as the basis of the present Bill will enable Indian courts to interpret its provisions in the light of the decisions of the English courts

In 1958 the Law Commission of India reporting on the Sale of Goods Act 1930 stated Having carefully examined the provisions of the Act in the light of judicial decisions in India since 1930 the development of the law relating to the sale of goods in other countries as well as the requirements of the modern welfare State we have reached the conclu

[55] *The Parchim* [1918] A C 157 160 161

sion that the provisions of the Act do not require any radical change [56]

In 1932 the chapter relating to partnership in the Indian Contract Act was repealed and the law of Partnership was embodied in the Indian Partnership Act [57] Speaking of the Act and the Sale of Goods Act Sir George Rankin says The new Partner ship Act takes like advantage from the work done in England Sir Frederick Pollock had before him the Commission s draft of 1866 when drawing out the clauses which became the Partnership Act of 1890 but the Indian Act of 1932 departs more freely from the English model putting more emphasis on the firm (or body of persons) as distinct from the partner ship (or relation between the persons) It has intro duced an improved arrangement by collecting in a separate chapter sections upon Incoming and Out going Partners and has made some provision for dealing with Goodwill [58]

Specific Relief

We have noticed how the enactment of the Contract Bill into law was delayed mainly by the opposition to its clauses relating to specific performance Even tually portions of the law of specific relief were put into a separate Bill which became the Specific Relief Act of 1877

[56] Eighth Report p 1
[57] Act IX of 1932
[58] Rankin *op cit* pp 97 98

Mr Hobhouse who piloted the Bill in the Council was an English lawyer of eminence He obviously drew his materials from the jurisprudence in which he had been trained The numerous illustrations given in the Act may with rare exceptions be identified with cases decided by the English equity courts

It is interesting to know from one who was closely associated with its enactment the sources from which the provisions of the Act were drawn For the most important part of the draft—that relating to the specific performance of contracts—some help was got from the New York draft but far more from the English equity reports and the works of Mr Dart and Lord Justice Fry Two of its sections (14 15) had been drafted in England by the Law Commissioners The chapters on Rectification Rescission and Cancellation are for the most part taken from the New York draft The chapter on Declaratory Decrees originally framed on section 15 of the Civil Procedure Code of 1859 (itself copied from the English enactment 15 & 16 Vict c 86 s 50) is in its present form suggested by the Scotch action of declarator The section on Receivers was suggested by Mr Pitt Kennedy The chapter on the Enforcement of Public Duties was distilled from Tapping s and other English books on mandamus and the draft of this part of the Act was submitted by the law member to Sir R Couch then Chief Justice of Bengal who returned it to him unaltered Lastly in drawing the chapters on Injunctions some help was

got from the New York chapter on Preventive Relief and Mr Kerr's work on the subject The Bill was carefully revised and much improved by Mr (now Lord) Hobhouse then law member of the Governor General's Council He in particular drew the section (22) on Discretion and most if not all the illustrations which had not been taken from the equity reports [59]

The rules regulating the validity of contracts and the legal relations of the parties to them were to be found in the Contract Act The remedies by way of compensation available to parties for the breach of contractual obligations could be pursued in the manner provided in the Civil Procedure Code But the courts of equity in England had evolved special reliefs by which the performance of the very obligations undertaken by persons could be enforced against them The purpose of the Specific Relief Act was to make these equitable reliefs to some extent available to persons entering into contracts

The reliefs given by the civil courts might be divided broadly into two classes those by which the suitor obtained the very thing to which he was entitled and those by which he obtained not that very thing but compensation for the loss of it The first kind of relief was known as specific relief and the second was known as or at any rate might be termed compensatory relief The Specific Relief Act does not deal with compensatory relief except incidentally and in so far as such relief is either supplementary to or

[59] Whitley Stokes *Anglo Indian Codes* Vol I 938 939

alternative to specific relief Its main purpose is to award specific relief to order the performance by the defaulting person of the specific act which he had agreed to do Such relief includes the ordering of specific performance of contracts and also orders by way of injunction which prevent persons from doing wrong and which may be called preventive relief Thus the Act though shortly styled the Specific Relief Act deals with specific as well as preventive relief Under the head of Preventive Relief it treats of perpetual injunctions The courts are also authorised to grant mandatory injunctions which are orders compelling the doing of specific acts to prevent a breach of an obligation undertaken by a person Under the head of Specific Relief it deals not only with specific performance of obligations arising from contract but also with other kinds of specific relief such as the awarding of possession of specific movable or immovable property the rectification of instruments the rescission of contracts the cancellation of instruments the making of declarations and the enforcement of public duties

The Act divides contracts into those which may be specifically enforced and others which cannot be so enforced Illustrations based on English decisions have been inserted into the Act to guide the courts in determining whether a contract falls into the one class or the other The grant of specific relief is however discretionary it being provided that the court is not bound to grant such relief merely because it is lawful to do so But the discretion of

the court is not arbitrary but sound and reasonable guided by judicial principles and capable of correction by a Court of Appeal The law itself lays down rules which are to serve as guides to the exercise of its discretion by the court[60]

Broadly speaking specific performance of a contract may in the discretion of the court be enforced in India in cases when the act agreed to be done is in the performance of a trust or when there exists no standard for ascertaining the actual damage due to the non performance of a contract or where pecuniary compensation for the non performance of the contract would not afford adequate relief or when pecuniary compensation cannot be got for the non performance of the act agreed to be done[61]

An important feature of the Act is the remedy which it provides for the recovery of possession of specific immovable property by the person entitled to it which is somewhat akin to the common law action in ejectment and that by a person dispossessed which resembles the old English assize of *novel disseisen* In so far as the Act provides for the recovery of specific movable property it would seem to embody the common law doctrine of detinue[62]

The chapter dealing with the enforcement of public duties enacts some of the provisions of the common law relating to the prerogative writ of mandamus[63]

[60] Specific Relief Act 1877 s 22
[61] *Ibid* s 12
[62] *Ibid* ss 8 9 and 10 Woodroffe *The Law Relating to Injunctions* 3rd ed p 11
[63] Specific Relief Act ss 45 51

SPECIFIC PERFORMANCE OF PART OF CONTRACT

The general rule as to ordering specific performance of part of contract was stated by Lord Romilly M R 'This court cannot specifically perform the contract piecemeal, but it must be performed in its entirety if performed at all [64] The Act incorporates this rule and lays down that the court shall not direct the specific performance of a part of a contract except in certain specified cases [65] The court may at the suit of either party direct the specific performance of so much of the contract as can be performed and award compensation in money for the deficiency where the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money Even in cases where a part of the contract left unperformed forms a considerable portion of the whole the party not in default may obtain specific performance of so much as can be performed if he relinquishes all claim to further performance and compensation from the other party In cases however where a part of a contract stands on a separate and independent footing from another part of it which cannot be specifically performed the court may direct the performance of the former part

The English law relating to partial performance was thus stated by Viscount Haldane In exercising its jurisdiction over specific performance a court of

[64] *Merchants Trading Co* v *Banner* (1871) 12 Eq 18 at p 23

[65] Specific Relief Act s 17

equity looks at the substance and not merely at the letter of the contract If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get the court will decree specific performance with compensation for any small and immaterial deficiency provided that the vendor has not by misrepresentation or otherwise disentitled himself to his remedy Another possible case arises where a vendor claims specific performance and where the court refuses it unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser who agrees to such a decree on condition that he is compensated If it is the purchaser who is suing the court holds him to have an even larger right Subject to considerations of hardship he may elect to take all he can get and to have a proportionate abatement from the purchase money [66]

The Indian law would thus appear to be the same as English law in regard to the right of specific performance when the part of the contract unperformed is small As regards the purchaser's right to enforce specific performance with compensation against the vendor there is it seems a material difference between the English and Indian law Under the English law if the difference in the value of the subject matter and its value stated in the contract can be measured by the court the vendee can have specific performance with a proportionate abatement in the

[66] *Rutherford (Duncan)* v *Acton Adams (William)* [1915] A C 866 at p 869

price The principle is thus stated by Lord Eldon If the vendee chooses to take as much as he can have he has a right to that and to an abatement and the court will not hear the objection by the vendor that the purchaser cannot have the whole But that always turns upon this that it is and is intended to be the contract of the vendor [67] Or as was stated by Lord Langdale M R The general rule subject to some qualification undoubtedly is that where a party has entered into a contract for the sale of more than he has the purchaser if he thinks fit to accept that which it is in the power of the vendor to give is entitled to a performance to that extent [68] The further condition in Indian law that the deficiency should be small or immaterial is not insisted upon in England Specific performance with compensation may be directed although the deficiency may extend to half of the property agreed to be sold [69]

When the deficiency is considerable neither under the English nor under the Indian law can the vendor enforce specific performance with compensation The vendee however can seek specific performance with compensation in English law for he can elect to take what he can get, and ask for compensation for the deficiency Under the Indian law however when the deficiency is large the purchaser can have specific *performance only on the condition that he abandons*

[67] *Mortlock* v *Buller* (1804) 10 Ves 292 316
[68] *Graham* v *Oliver* (1840) 3 Beav 124 128
[69] *Hooper* v *Smart Bailey* v *Piper* (1874) 18 Eq 683

Act in its arrangement follows the book of Justice Byles and is a codification of the English law with some minor changes The English Bills of Exchange Act which was passed a year later has perhaps a more scientific arrangement and clearer and more analytical provisions The difficulty of those who prepared the draft must however be realised The subject was a difficult one the law on many points was uncertain and they had not before them any code which they could follow In the circumstances it can be said that the framers of the Act achieved a fair measure of success

Law of Real Property

A very important measure came to be placed on the Statute Book of India in the year 1882 in the Transfer of Property Act enacted in that year Before its enactment India it may be said had no law of any importance dealing with real property A few points were covered by the Regulations and the Acts which were repealed either wholly or in part by the Statute of 1882 But for the rest of the law the courts in the absence of any statutory provisions had adopted as their guide the English law under the guise of rules of justice equity and good conscience The application of the rules of English law to conditions in India which were totally different had led to confusion and conflicts

The kernel of the Bill which became the Transfer of Property Act was the draft made in England by

court [74] were borrowed from that statute In framing the sections relating to the law of mortgages of immovable property and charges assistance was taken from the work of Dr Rashbehary Ghose a distinguished writer on the law of mortgages in India [75] At the suggestion of Sir Henry Maine who was a strong advocate of the Continental system of a public transfer of land the Act made written and registered instruments obligatory in certain cases of sales mortgages leases exchanges and gifts of immovable property [76]

The Succession Act and the Contract Act having been put on the Statute Book the chief purpose of this Act was to bring the rules which regulated the transmission of property between living persons into harmony with the rules effecting its devolution and thus to furnish as it were a complement to the work accomplished in framing the law of testamentary and intestate succession Its second purpose was to complete the code of the law of contract in so far as it related to immovable property [77]

Though the Act covers a large area of the law of transfer of real property it does not profess to be a complete code It was intended to define and amend the existing law and not to introduce any new principles [78] When therefore the provisions of the

[74] *Ibid* p 69
[75] Whitley Stokes *Anglo Indian Codes* Vol 1 p xxviii note 1
[76] *Ibid* p 739
[77] Whitley Stokes *op cit* p 776
[78] *Tajjo Bibi v Bhagwan Prasad* (1918) I L R 16 All 295

Act are not applicable to a case the courts are entitled to apply rules of English law not inconsistent with the Act as rules of justice equity and good conscience Cases arising out of transactions made prior to the application of the Act to a particular State would also be governed by the principles of the common law [33]

Perpetuities

A perpetuity in its modern sense denotes an interest which will not vest till a remote period Looked at from this point of view what is now called the rule against perpetuities may perhaps be more appropriately called the rule against remoteness [illegible] as it restrains the creation not of interests which are inalienable or indestructible [illegible] future interests which are intended to vest [illegible] beyond specified limits of time [34]

The justification for the rule against perpetuities is said to be found in public policy "It was soon perceived that when increased [illegible] were given to the alienation of property and modes of disposition unknown to the common law [illegible] it was necessary to confine the [illegible] these interests within such limits as [illegible] adequate to the

[33] Maharaja of J[illegible] (1917) [illegible] Ind App 100 [illegible]

[34] Ashutosh [illegible] The Law of Perpetuities [illegible] India Tagore Law Lectures p 2 [illegible]

exigencies of families without transgressing the bounds prescribed by a sound public policy [81]

The common law rule against remoteness of limitation—against transfers or bequests to unborn persons—is enacted in section 13 of the Transfer of Property Act of 1882 and section 113 of the Succession Act of 1925 The English rule against perpetuities is contained in section 14 of the Transfer of Property Act and section 114 of the Indian Succession Act

As to remoteness of limitation the Act provides that when an interest is created for the benefit of a person not in existence at the date of the transfer subject to a prior interest the interest for the benefit of the person not in existence shall not take effect unless it extends to the whole of the remaining interest of the transferor in the property In regard to perpetuities the Act prevents the creation of an interest which is to take effect after the lifetime of one or more persons living at the date of the transfer and the minority of some person who shall be in existence at the expiration of that period and to whom if he attains full age the interest is to belong

The English rule against perpetuities deals both with interests created *in praesenti* and interests to arise *in futuro* The rule incorporated in the Indian Act deals with interests to arise *in futuro* only and there is no express provision prohibiting or dealing with interests *in praesenti* which are sought to be made of indefinite duration There is a difference also in the period during which vesting may be de

[81] Jarman on *Wills* 7th ed 266n

lived, the English law allows twenty-one years in gross after life or lives in being,[82] while the Indian law permits only the period of majority after a life or lives in being. Some interests created *in praesenti*, for example charitable trusts and unfettered present gifts to perpetual institutions are permissible and valid in England. They are regarded as exceptions to the rule against perpetuities in so far as that rule applies to interests *in praesenti*. Finally, charitable trusts *in futuro* are no exceptions to the modern English rule against perpetuities which deals with estates *in futuro*. Charitable trusts to be valid in England must therefore vest within the period allowed by the English law and if the vesting is delayed beyond that period the charitable trust will fail.[83] The position of these trusts in India is different. The Act relaxes the rule against perpetuities in respect of transfers of property for the benefit of the public or for the advancement of religion or knowledge or for any other object beneficial to mankind and the vesting of such transfers *inter vivos* may be delayed beyond the period of perpetuity.[84] But there is no similar relaxation of the rule against perpetuities in the Succession Act. On the contrary, as we have noticed, that Act imposes an additional restriction on charitable or religious bequests by a person who has near relations.[85]

[82] *Cadell (Thomas) v. Palmer (Arthur) etc.* (1833) 1 Cl. & F. 372.
[83] *Swain, Re, Monkton v. Hands* [1905] 1 Ch. 669.
[84] *Transfer of Property Act*, s. 18.
[85] Succession Act, s. 118.

Part Performance

The doctrine of part performance furnishes a powerful example of the influence exercised by the decisions of courts of equity in England on the development of Indian law. Eventually the doctrine became a part of the codified law of India though in a modified form.

The principle on which the doctrine rests is that if a man has made a bargain with another and allowed that other to act upon it he will have created an equity against himself which he cannot resist by setting up the want of a formality in the evidence of the contract out of which the equity in part arises.[86] In England the doctrine was invoked to take a parole contract out of the Statute of Frauds. It was said: Courts of equity will not permit the statute to be made an instrument of fraud. In India the doctrine has been invoked to take a document requiring registration out of the provisions of the Transfer of Property and Registration Acts in regard to registration. In a case from India where the defendant had taken possession of a parcel of land under a verbal agreement to give a permanent lease at a fixed rent the Judicial Committee of the Privy Council declared that the doctrine of part performance was inapplicable in India.[87] The English doctrine in a modified form has however been recognised in India by an amendment of the Transfer of Property

[86] *Chaproniere* v. *Lambert* [1917] 2 Ch. 356, 361.
[87] *Ariff* v. *Jadunath* (1931) 58 Ind App 91.

Act made in 1929[88] The Indian law requires that the contract should be in writing signed by the party whom it is sought to bind or his agent In this it differs from the English doctrine which is applied to parole contracts Moreover in England any act not necessarily the act of taking possession unequivocally referable to the contract is a sufficient act of part performance In India the doctrine cannot be availed of unless the transferee has been put in possession of the property Further except in cases of contracts of lease where specific performance may be asked for on the ground of part performance[89] the doctrine of part performance can be invoked in India by way of defence only In England it is an active equity which can support an action for specific performance or injunction to restrain eviction

Equity of Redemption

In British India the doctrine of equity of redemption was it appears not originally recognised In 1870 the Privy Council in a case from Madras stated that the doctrine was unknown in India[90] This view was reiterated by it in a later case[91] which characterised the decisions of the Madras and Bombay High Courts to the contrary as instances of the usurpation by the courts of the functions of the legislature In

[88] Specific Relief Act s 53A
[89] Specific Relief Act s 27A
[90] *Pattabhiramier v Vencatarow* (1870) 13 Moore Ind App 560 571 572
[91] *Thumbasawmy Mudelly v Md Hossain* (1875) 2 Ind App 241

view however of the current of decisions which had recognised the equity in India the Judicial Committee observed In the case of a security executed since 1858 there would be strong reasons for recognising and giving effect to the Madras authorities with reference to which the parties might be supposed to have contracted They deem it right however to observe that this state of the law is extremely unsatisfactory and one which seems to call for the interposition of the legislature

The Madras and Bombay courts had in substance applied the doctrine recognised by the equity courts in England The equity of redemption in England was a right not given by the terms of the agreement between the parties to it but contrary to them *to* have back securities given by a borrower to a lender on payment of principal and interest at a day after *that appointed for payment when by the terms* of the agreement between the parties the securities were to be the absolute property of the creditor [92] That equity was later recognised as a legal right in England

In India this right was given statutory recognition by the Transfer of Property Act [93] The right to redeem can be claimed notwithstanding a *contract to* the contrary when the principal money of the mortgage becomes due and subsists until it is put an *end* to in *due course of* law

[92] *Ewing v Buttercup Margarine Co* [1897] A C 1
[93] s 60

Leases

The Indian Act defines the liabilities of a lessor and a lessee in terms which are said to be expressions of well settled principles familiar to the law of England [94] The provisions of the Act in regard to leases have to be judged in the background that the principles of English feudal law were at no time applicable in India [95] One may illustrate this by reference to the provisions in the Indian Act recog nising contrary to the law in England a lease in per petuity Lest the settled usages be disturbed the provisions as to leases in the Act do not apply to agricultural leases[96] unless they are applied by a specific notification However in the absence of any local Act or custom or any special reasons to the contrary the principles of English law as enacted in the Act have been applied to agricultural leases [97]

Choses in Action

The Act deals also with the transfer of actionable claims which may be described as choses in action in the language of English law Thus in a way the Indian Act seems to recognise the distinction in England between a chose in action and a chose in possession A chose in action in England would in

[94] Transfer of Property Act s 108 *Indu Bhusan* v *Moazam Ali* A I R [1929] Cal 272
[95] *Ranee Sonet Kowar* v *Mirza Himmut Bahadoor* (1876) 3 Ind App 92
[96] Transfer of Property Act s 117
[97] *Gangamma* v *Bhommakka* (1910) I L R 33 Mad 253 Mulla *Transfer of Property Act* 4th ed p 707

clude debts negotiable instruments dividends, debentures patents copyright bills of lading legacies and rights of action arising out of contract or tort[98] The Indian statute defines an actionable claim as a claim to any debt other than a mortgage debt or to any beneficial interest in immovable property not in the possession of the claimant A chose in action in England is either legal or equitable But there is no distinction in India between legal and equitable claims The common law did not permit the assignment of a chose in action Certain kinds of choses in action such as bills of exchange and promissory notes became assignable first by the custom of merchants and later by statute In equity however the assignment of a chose in action was recognised at an early period The Indian Act provides for the transfer of actionable claims[99] The mode of assignment provided by it combines the features of both the statutory and equitable modes of assignment in English law Like the statutory assignment it has to be in writing and entitles the assignee to sue in his own name Like equitable assignments it applies to assignments by way of charge as well as absolute assignments and takes effect as between the assignor and the assignee from the date of the assignment

The Act has been amended several times In 1929 it was subjected to numerous changes[1] Some of the sections inserted by the Amending Act of 1929 were

98 Halsbury 3rd ed Vol 4 pp 480-482 para 998
99 Transfer of Property Act ss 130 131 132
1 *Ibid* ss 3 53A 60A 60B 61 63A 65A 67A 69A 92 101

borrowed from the English Law of Property Act of 1925 It would therefore clearly be permissible to refer to English decisions under that Act for the interpretation of these newly introduced sections[2]

The Act has not been applied to some parts of India like the Punjab In these areas the provisions of the Act as to matters of principle are followed as rules of justice equity and good conscience

Torts

An important branch of law which has remained uncodified in India is the law relating to civil wrongs

Some of the most important rights of a person which the law protects from injury are rights to the security of his person his domestic relations and his property and reputation The liability for a tort may arise from intentional wrongdoing neglience or out of an absolute liability imposed without any default on the part of the person held liable It may be a vicarious liability as that of a master for his servant s tort or a breach of duty under a statute for example the duty of an employer under the Factories Act The law on the one hand allows certain harms to be inflicted irrespective of the moral condition of him who inflicts them At the other extreme it may on grounds of policy throw the absolute risk of certain transactions on the person engaged in them irrespective of blameworthiness in any sense Most liabilities in tort lie between these two extremes[3]

[2] Mulla *Transfer of Property Act* 4th ed p 2
[3] Holmes *Common Law* p 145

In the law of tort parties are brought into relation not by mutual agreement but under a general obligation emanating from the social duties which the well being of a community requires[4]

One of the outstanding facts of English legal history for the last three centuries is the development of the law of torts from small beginnings to its present dimensions as a separate branch of law The action for damages as a remedy for violation of rights and duties has been fashioned by lawyers judges and juries of England as an instrument for making people adhere to standards of reasonable behaviour and respect the rights and interests of one another A body of rules has grown and is constantly growing in response to new concepts of right and duty and new needs and conditions of advancing civilisation The principles which form the foundation of the law of torts are usually expressed by saying that *injuria sine damno* is actionable but *damnum sine* (or *absque*) *injuria* is not[5] As an illustration of the former rule one may instance the case in which the House of Lords held that a man who has a right to vote at an election for Members of Parliament may maintain an action against the returning officer for refusing to admit his vote[6] The latter rule may be illustrated by the old case where it was held that the plaintiff who was a school master had no right to

[4] Report of the Committee on the Law of Defamation 1948 p 8 para 12

[5] Expressions said to have been first used by Bracton when analysing the wrong of nuisance

[6] *Ashby v White* Sm L C 13th ed Vol I p 253

seemed suitable to Indian conditions has been applied as rules of justice equity and good conscience

A familiar illustration is the principle enunciated by the Judicial Committee of the Privy Council as early as 1872 that in India witnesses cannot be sued in a civil court for damages in respect of evidence given by them upon oath in a judicial proceeding [10] The courts in India however have not hesitated to depart from the common law rules when they appeared unreasonable or unsuitable to Indian conditions

The doctrine of common employment enunciated in England laid down[11] that a master was not liable to a servant who was injured by the wrongful act of a fellow servant who was at the time in common employment with him The English law has undergone a change by the enactment of the Employers Liability Act 1880 which has introduced a number of exceptions to the doctrine The doctrine was finally abolished in England by the Law Reform (Personal Injuries) Act 1948

In 1937 a High Court in India refused to apply the doctrine It observed *In considering what is today consonant to justice equity and good conscience one should regard the law as it is in England today and not the law that was part of the law of England yesterday One cannot take the common law of England divorced from the statute law of England*

[10] *Gunnesh Dutt v Mugneeram Choudhry* (18 ?) 11 B L R 395

[11] *Priestly v Fowler* (1837) 3 M & W 1

and argue that the former is in accordance with justice equity and good conscience the doctrine of common employment would not apply not because the case would fall outside the common law doctrine of common employment but because it would fall inside the Employers Liability Act 1880"[12] After this case came the enactment of the Employers Liability Act by the Indian Legislature in 1938

As an illustration of the rejection by the Indian courts of English rules which they thought should not apply to India may be mentioned the rule of English law[13] that although it is possible to bring separate actions against joint tortfeasors the sums recoverable under these judgments by way of damages are not in the aggregate to exceed the amount of the damages awarded by the judgment first given[14] In India the rule has been held to be not in consonance with any principle of equity justice and good conscience

In England both in the law of torts and criminal law libel and slander stand on a different footing The distinction between them has not been altered by the recent legislation in England[15] In India both libel and slander constitute the criminal offence of

[12] *Secretary of State* v *Rukhminibai* A I R (1937) Nag 354 367 368

[13] Law Reform (Married Women and Tortfeasors) Act 1935 s 6 (1) (*b*)

[14] *Nawal Kishore* v *Rameshwar* A I R (1955) All 594 at 595

[15] Defamation Act 1952

defamation under the Indian Penal Code[16] There is no statute law in India governing the civil liability for defamation Such liability has to be determined either with reference to the rules of English common law where they are shown to be applicable as in the Presidency Towns or with reference to the principles of justice equity and good conscience in other cases

In civil actions for defamation the common law rule as to the absolute privilege of counsel has been applied in India[17] However if a party to a judicial proceeding is prosecuted in a criminal court for defamation in respect of a statement made by him in judicial proceedings his liability has to be determined by a reference to the provisions of the Indian Penal Code In such cases the court will not by reference to the common law be entitled to add exceptions to those which are already enacted in the Code A *person so prosecuted would be entitled only to the* benefit of qualified privilege which the Penal Code confers[18]

LIABILITY OF THE STATE

The question of the liability of the State in tort has assumed great importance in the modern welfare State The increased activities of the State have an impact on the citizen in a far greater degree than before In England and in the United States the mat

[16] s 499
[17] *Jagat Mohan* v *Kalipada Ghosh* A I R (1922) Patna 101 *Munster* v *Lamb* (1883) 11 Q B D 588 referred to
[18] *Satish Chandra* v *Ram Doyal De* A I R (1921) Cal 1

ter is now regulated by legislation [19] The tendency in England would appear to be towards a greater relaxation of the immunities of the Crown in favour of the subject There would appear to be a feeling that the legislation already enacted has not gone far enough

The subject has a long history of legislation and judicial decisions in India When the Crown assumed in 1858 the sovereignty of the territories of India which were till then being administered by the Company it was provided that All persons and bodies politic shall and may have and take the same suits remedies and proceedings legal and equitable against the Secretary of State for India as they could have done against the said Company [20] This provision was continued in subsequent Government of India Acts [21] The extent of the liability of the Company before 1858 therefore governed the liability of the Crown in India after 1858

The Company was invested with powers of a two fold character They had on the one hand power to carry on trade as merchants on the other hand powers had been delegated to them to acquire retain and govern territories to raise and maintain armies and make war and peace with native powers in India Broadly speaking a distinction was drawn between these two functions of the East India Company it

[19] Crown Proceedings Act 1947 the Federal Tort Claims Act 1946

[20] Government of India Act 1858 s 65

[21] Government of India Act 1915 s 32 Government of India Act 1935 s 176 (1)

having been held that it was liable to be sued in respect of the former kinds of functions but not in respect of the latter. Its liability to be sued was not however altogether restricted to claims arising out of undertakings which might be carried on by private persons. It was extended to other claims also if they did not arise out of acts of State or had reference to actions of the Company done under sanction of municipal law and in exercise of powers conferred by such law. The Supreme Court of India had occasion recently to deal with the matter and it accepted the view taken in some of the earlier decisions of the Indian courts.[88]

Dealing with the question as to what amounted to an act of State the court quoted with approval Lord Atkin:[89] "This phrase (act of State) is capable of being misunderstood. As applied to an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad it may give rise to no legal remedy. But as applied to acts of the executive directed to subjects within the territorial ju
it has no special meaning and can give n
from the jurisdiction of the court to inqu
legality of the act. In a later decision t

more liberal in its provisions than the legislation in the United States its scope in respect of statutory duties and powers was very restricted The Commission has recommended legislation in India making the State liable in tort in a number of specified matters and imposing liability on a much wider scale than under the Crown Proceedings Act in England

We have passed in brief survey the series of the important Anglo-Indian Codes through the media of which large sectors of the English common and statute law have infiltrated into India and established themselves as the core of the Indian statutes We had also a view of the Indian law in an area not covered by a Code such as that of civil wrongs Here the English common and statute law holds the field even in a greater degree

Adjective law in India owes almost as much to English law as India's substantive law

The law of evidence found scattered in the English textbooks was codified in India in the year 1872 Mr Stephen (later Sir James Stephen) in presenting the report of the Select Committee on the Bill claimed that it would be found to embrace arranged in their natural order the subjects treated by English text writers and judges under the general head of the Law of Evidence [26] The law of evidence was codified in India on the basis of the English law keeping in view as in the case of the other Codes the differences between the English practice mould

[26] Sir J Woodroffe *Law of Evidence* 9th ed p 1109

ed by English social conditions and procedures and the conditions then obtaining in India

The codification of the procedure of the civil courts of the whole country was first made by the Civil Procedure Code of 1859 This was followed by successive Codes and eventually came the Civil Procedure Code of 1908 which now regulates proceedings in civil courts The chief feature of the Code of 1908 is its division into two parts on the lines of the Judicature Acts and the rules of the Supreme Court framed under these Acts Here again we have a procedural system which broadly follows the base of English procedure modifying it to suit Indian conditions

To sum up the base and the foundation of the civil law of India is English common and statute law But the structure reared on that foundation has been so adapted to Indian needs and conditions that it may notwithstanding its exotic origin be regarded as peculiarly Indian in its form as well as in its working

Chapter 3

CRIMINAL LAW

The Indian Penal Code may be described as the criminal law of England freed from all technicalities and superfluities systematically arranged and modified in some few particulars (they are surprisingly few) to suit the circumstances of British India said Stephen[1] Sir Frederick Pollock thought that such a description of the Code was perhaps an overstatement But even he was of the view as we have seen above that the Code was English criminal law simplified and set in order It is pertinent to this study to examine how far the Code has in fact derived in its basic principles from the criminal law of England

Criminal Law before the Code

We have seen how when the Company took the administration of criminal justice into its hands after the assumption by it of the Dewani in 1765 it continued the Mahomedan criminal law which had till then been applied by the Nazims It was applied in Bengal in Madras and later on in other parts of India though not in Bombay to Hindus as well as to Moslems[2] Thereafter came slow attempts by

[1] *History of Criminal Law of England* Vol 3 p 300
[2] Rankin *Background to Indian Law* p [illegible]

the Company to alter and reform the criminal law Many of the punishments provided by the Mahomedan criminal law were barbarous In 1773 Hastings made proposals for the reform of the criminal law with a view to correcting these cruel punishments In 1790 Lord Cornwallis the successor of Hastings recorded that The general state of the administration of criminal justice throughout the Provinces is exceedingly and notoriously defective [3] and made proposals for the enactment of Regulations reforming the criminal law In 1793 was enacted what has been known as the Cornwallis Code which was in effect the criminal procedure code but it included the necessary amendments of the Mahomedan law restating the enactments of the last three years in that behalf [4]

Large territories forming part of the Province of Bombay had not before their acquisition by the Company been under Moslem rule and the administration of criminal justice there had proceeded on lines different from those in Bengal and Madras The Bombay system is thus described by Elphinstone in 1822

> We do not as in Bengal profess to adopt the Mohammedan code We profess to apply that code to Mohammedan persons the Hindoo code to Hindoos who form by far the greatest part of the subjects The Mohammedan law is almost as much a dead letter in practice with us as it is in Bengal and the Hindoo law generally gives the Raja on all occasions

[3] *Ibid* p 170
[4] Regulation IX of 1793 Rankin *op cit* p 171

the choice of all possible punishments The consequence is that the judge has to make a new law for each case [5]

Impressed with the need for a better and more uniform system of law Elphinstone who was said to be a great admirer of Bentham enacted when he became Governor a series of Regulations which came to be known as the Elphinstone Code This was mainly the result of the labours of Sir William Anderson who later became one of the colleagues of Macaulay on the first Indian Law Commission The Bombay Code of 1827 has been described as a great advance upon anything previously attempted in India and served to prove by thirty years experience of its working that there was no difficulty in applying a general code founded upon European principles to the mixed populations of India [6] This was followed by Regulation XIV of 1827 which included a penal code The regulation has been described by Fitz James Stephen as a body of substantial criminal law which remained in force until it was superseded by the Criminal Code (that is the Indian Penal Code) and which had very considerable merits [7]

Thus when the Charter Act of 1833 introduced a single legislature for the whole of British India with jurisdiction to legislate for persons in the Presidency Towns as well as the mofussil the state of laws generally and particularly of criminal law was extremely unsatisfactory The Regulations which had

[5] *Life of Elphinstone* by Sir T E Colebrooke 1882 Vol II p 125 quoted in Rankin *op cit* p 185
[6] Quoted in Rankin *op cit* p 195
[7] Quoted in Rankin *op cit* p 195

attempted to build up a system of laws in different parts of the country were described by Morley as an incongruous and indigested mass [8] At this time each of the three Presidencies enjoyed equal legislative powers though the Governor General possessed a right of veto over the legislation of the subordinate governments it had in fact been little exercised Thus had come into existence three series of Regulations as these enactments were called frequently ill drawn for they had been drafted by inexperienced persons with little skilled advice frequently conflicting in some cases as a result of varying conditions but in others merely by accident and in all cases enforceable only in the Companys courts because they had never been submitted to and registered by the Kings courts [9]

These comments directed generally to Regulations applied with equal force to the criminal law administered in the three Presidencies Inevitably with the functioning of different legislative authorities in the three Presidencies there was a complete lack of uniformity in the law applied in the mofussil Moreover Side by side with the penal law thus variously adapted to the country districts of the Provinces the law of England remained in the three Presidency Towns the basis of the criminal jurisdiction of the

[8] *Administration of Justice of British India* 1858 p 158 *Digest* Vol 1 p clv quoted in Rankin *op cit* p 197
[9] *Cambridge History of the British Empire* Vol V p 5 quoted in Rankin *op cit* at p 198

Supreme Courts untouched by any regulations [10] Calling attention to these divergent laws the first Indian Law Commission of 1837 said It is noticed for example as regards forgery and perjury that in Bengal serious forgeries were punishable with double the term of imprisonment for perjury in Bombay perjury was punishable with double the imprison ment provided for the most aggravated forgeries while in Madras the two offences were exactly on the same footing [11] Illustrations of similar contra dictory provisions can be multiplied Whitley Stokes has observed that these regulations contained widely different provisions many of which were amazingly unwise [12] In the words of Lord Bryce 'The criminal law became a patchwork of enact ments so confused that it was the first subject which invited codification [13]

Appreciating this chaotic state of affairs and the imperative need for uniformity and reform Parlia ment by the fifty third section of the Charter Act of 1833 appointed the first Indian Law Commission reciting that it was expedient to enact such laws as may be applicable in common to all classes of the inhabitants of the said territories due regard being had to the rights feelings and peculiar usages of the people

[10] Rankin *op cit* p 193
[11] *Ibid* p 199
[12] Stokes *Anglo Indian Codes* Vol I p 2
[13] *Studies in History and Jurisprudence* Vol I p 1?0 quoted in Rankin *op cit* p 199

THE PREPARATION AND PASSING OF THE CODE

The decision that the penal law in India should be first selected for codification was made by Macaulay His speech on the second reading of the Bill which ultimately became the Charter Act of 1833 is justly celebrated and his work in India as the first legal member of Council had effects both lasting and extensive [14] The minutes recorded by him as the legal member full of erudition and couched in his incisive English are to be found in the archives of the Ministry of Law and are still read with interest Some of them were recently referred to and quoted in the Report of the Indian Law Commission of 1955 It may be said without injustice to any of his colleagues on the first Indian Law Commission that the draft of the Indian Penal Code may be attributed to him

One may refer to the distinguished men who assisted Macaulay in the compilation of this code the most towering structure in the pile of Indian Codes which has served the country for a hundred years Perhaps the most distinguished of his colleagues was Charles Hay Cameron who has been described by Leslie Stephen as a disciple and ultimately the last disciple of Jeremy Bentham He later became a Law Member of the Governor General s Council Two other colleagues were John Macpherson Macleod and George William Anderson who were distinguished civil servants from Madras and

[14] Rankin *op cit* p 201

Bombay Anderson became later a judge of the Companys chief Court of Appeal Cameron and Macleod were also members of the Law Commission appointed under the Act of 1853 which sat in England Macleod was a member also of later Com missions which drew up drafts of other laws which were later codified

Though the Code did not reach the Statute Book till 1860 it appears that Macaulay had succeeded in finishing the draft of the Code as early as 1837 In a letter written by him on June 15 1837 he stated The Penal Code of India is finished and is in the press The illness of two of my colleagues threw the work almost entirely on me [15] The delay in enact ing the Code and other laws the drafts of which were drawn up by later Commissions are attributed to the difficulties of government in those times which threw the reform and codification of the law into the background Indeed at one time it appeared that the idea of enacting it might be abandoned A government official wrote to the Law Commission asking them to revise their draft with a view to its adoption with amendments or to its final disposal otherwise The story of the delay in its enactment the careful revision which the draft received and its ultimate adoption may be told in the words of Stephen Then came the Mutiny which in its essence was the breakdown of an old system The effect of the Mutiny on the Statute B unmis

15 Sir G O Trevelyan s *Life of M* quoted in Rankin *op cit* p 201

takable The Code of Civil Procedure was enacted in 1859 The Penal Code was enacted in 1860 and came into operation on January 1 1862 The credit of passing the Penal Code into law and of giving to every part of it the improvements which practical skill and technical knowledge could bestow is due to Sir Barnes Peacock who held Macaulay s place during the most anxious years through which the Indian Empire has passed [16]

That the Code has established itself as an eminently successful code of law both in India and elsewhere may now be affirmed without fear of contradiction says Sir George Rankin He continues It is working as law in so many parts of the world that it may be regarded as having passed the highest objective test Its merits are acknowledged so ungrudgingly that one would hardly have supposed that a body of rules could have commanded so much admiration for being comprehensible and concise The praise of its form is due in part to the reasons which make specially acceptable in India a system which guards the liberty of the subject by showing in an exhaustive series of plain statements what acts and omissions are by the law made punishable [1]

Its Groundwork

Macaulay intended that his draft of the code should not be based on any existing system of criminal law

[16] *Ibid* pp 417-418 Rankin *op cit* p 202
[17] Sir G O Trevelyan *op cit* Vol I pp 417 418 Rankin *op cit* pp 202 203

substantially English[23] Whitley Stokes says as in the case of the other codes its basis is the law of England stript of technicality and local peculiarities shortened simplified made intelligible and precise [24] Sir Henry Maine has referred to the Code as that admirable Penal Code which was not the least achievement of Lord Macaulay s genius and which is undoubtedly destined to serve some day as a model for the criminal law of England [25] It appears that Macaulay and his col leagues striving all the time to keep away from the established systems of criminal law and particularly the English system so that they might arrive at a result truly suited to India s needs travelled uncon sciously but inevitably along the track of principles in which they had been trained and to which they were accustomed

Nevertheless it is true as has been stated in one of the notes appended to the draft of the Code that no law has any claim to our attention except that it may derive from its own internal excellence How the basic groundwork of English law has remained unaffected in spite of the changes worked into it by way of improvement modification and simplification has been clearly illustrated by Sir George Rankin The notes upon each chapter do firmly impress upon the reader that greater even than the modi fication of English rules which were directed to meet

[23] *Studies* Vol I p 126
[24] *Anglo Indian Codes* Vol I p 71
[25] *Village Communities in the East and West* 1871 p 115

specialities of Indian conditions were those which are due to an opinion that the various rules of law in force in England were capable of improvement and simplification Right reason and not local colour accounts for most of the departures It is impossible to simplify without amending and if on each topic one set oneself to note all the variations one might easily end by losing sight of the ground work that had been left untouched Thus theft (section 378) differs from larceny in England in a number of respects *e g* intention to deprive the owner of his property is not a necessary element But who would fail to recognise the English legal notion behind the English word though asportation is not mentioned when he reads whoever intending to take dishonestly any movable property moves that property in order to such taking Again in the offence of defamation (section 499) no difference is made between spoken and written words in Macaulay s draft it was proposed that truth should be a complete defence but this suggestion was not in the end adopted With or without such amendments—small differences may be the most confusing—who would fail to see that section 499 is a revision of the English law [6]

These examples indicate not only that basic English notions underlie most of the crimes defined in the Code but also that these basic notions have been simplified and modified with care to adapt them to Indian conditions

[25] Rankin *op cit* p 208

sion in the written law [29] A different view seems however to have been taken of such illustrations by the authors of the later codes who also made extensive use of them They regarded the illustrations as not merely examples of the law in operation but the law itself showing by examples what it is It was said that as law could be made by judicial decisions so could it be made by illustrations inserted in the body of a code

Crimes are divided in England into treasons felonies and misdemeanours [30] Indeed the whole calendar of crimes is a great mix up of felonies and misdemeanours It is not easy to discover any principle on which this division into felonies and misdemeanours has been arrived at It can be explained only on the basis of historical considerations [31] Offences may be arranged under the broad division of offences against the person of the individual the

[29] Quoted in Rankin *op cit* p 203

[30] *Treasons* are offences against the state against the person of the sovereign and his consort and the heir apparent *Felonies* whilst not being such a select class are still definitely upper class in the sociology of crime They are the acts which mankind has recognised as far back as Old Testament days as so gross and provocative that immediate steps must be taken to discourage those who commit them—murder manslaughter rape burglary and stealing are examples *Misdemeanours* are a great residual class Crimes which are not treasons or felonies are misdemeanours They are largely made up of minor offences dealt with summarily in the magistrates courts but disconcertingly enough they also include offences of the greatest gravity such as perjury fraud wounding certain offences of forgery coinage and so on F T Giles *The Criminal Law* 1954 78 79 See Halsbury 3rd ed Vol 10 pp 293 294 paras 518 519

[31] Kenny s *Outlines of Criminal Law* 16th ed 1952 by Turner pp 96 98

property of the individual and the public rights[32] The Indian Code has adopted a somewhat similar but more detailed division

The Scheme of the Code

The scheme of the Code is to divide offences into different categories and deal with them in separate chapters We have for example offences against the *state*[33] *such as waging war against the Government* of India and sedition We have also offences relating to the army navy and air force[34] such as abetting mutiny and harbouring deserters from the army We have next offences against the public tranquillity[35] such as being a member of an unlawful assembly and rioting Offences by or relating to public servants[36] such as a public servant taking an illegal gratification disobeying a law with a certain intent or unlawfully engaging in trade are put together in a class There is also a class of offences which consists of contempts of the lawful authority of public servants[37] These include non attendance in obedience to an order from a public servant or disobedience to an order made by him or a threat of injury to a public servant An important chapter of the Code deals with offences affecting the human body such as offences against life hurt wrongful restraint crimi

[32] *Ibid* p 100
[33] Indian Penal Code Chap VI
[34] *Ibid* Chap VII
[35] *Ibid* Chap VIII
[36] *Ibid* Chap IX
[37] Indian Penal Code Chap X

nal assault and kidnapping An equally important chapter of the Code concerns offences against pro perty such as theft extortion robbery criminal breach of trust mischief and criminal trespass We have chapters also dealing with offences concerning elections coin and Government stamps weights and measures and offences relating to religion Then we have offences relating to marriage One of the con cluding chapters deals with the offence of defamation which corresponds broadly with the crime of criminal libel in England This general but illustrative enu meration serves to give one an idea of the wide and exhaustive sweep of the Code There is little doubt that the repeated revisions to which the draft of 1837 was subjected before its enactment into a Code in 1860 helped to make it the perfect Code that it has been found to be by experience

Many of the offences in the Code are crimes in English law like manslaughter larceny and criminal libel which have been given different names with their ingredients adapted to Indian conditions Some which have their origin in the social econo mic and religious life of India have no counterparts in the English system An interesting comparison of the two systems made in 1890 showed as many as eighty four variations some of which were undoubt edly traceable to the fact that in India the law was wholly codified [38]

[38] Sir Ronald K Wilson *Comparative Tables of English and Indian Law* London pp 7 19

The basis of the Code is said to lie in its second section which provides that Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof [39] In its various sections the Code proceeds to deal with the acts or omissions which according to its provisions would be offences defining in each case the elements constituting the offence and providing the punishment for it

We may illustrate this by a reference to the offence of theft If a person intending to take dishonestly any movable property out of the possession of any person without that person s consent moves that property in order to such taking he is said to have committed theft A dishonest intention to take the *property is an essential element in the offence* The further necessary elements are that the property must be movable it should be taken out of the possession of another person it should be so taken without his consent and there must be a moving of the property for the purpose of taking it The punishment prescribed is a maximum of three years imprisonment or a fine or both [40]

One may compare the Indian offence of theft with the offence known in English law as larceny to which it corresponds The Larceny Act of 1916 gave a definition of stealing but not a definition of larceny The definition did not however make any change in the common law offence of larceny as then under

[39] Rankin *op cit* p 203
[40] Indian Penal Code ss 378 379

stood A person 'Who without the consent of the owner fraudulently and without a claim of right made in good faith takes and carries away anything capable of being stolen with intent at the time of such taking permanently to deprive the owner thereof was said to have stolen that thing A person may under that definition be guilty of stealing a thing notwithstanding that he is lawfully in possession of it if being a bailee or part-owner of it he converts it to his own use The offence of theft under the Indian Code differs substantially from the offence of larceny in English law The Indian Code emphasises the possession of the person from whom property is stolen whereas the English definition is concerned with the owner of the property In India a theft may be committed though the person from whom the thing is taken has no title to it but in the case of larceny the owner should have some general or special ownership in it There are other substantial differences also in the elements of the two offences Yet the basic idea of the Indian offence of theft is no other than that which underlies the offence of larceny at common law We have the element of the subject matter of the theft being something movable There is also the idea of movement or what is known in English law as asportation We have also in the Indian definition a guilty mind or intent in the words intending to take dishonestly which in the English definition is comprehended in the words fraudulently and without a claim of right made in good faith Finally we have also

the essential that the moving or the taking must be without the consent of the possessor in the one case and the owner in the other

All offences are defined with precision in the Code The definition states not only the act or omission which is regarded as a crime but also the state of the mind of the person who does the act or omits to do it and which is an essential element in the offence The definition clauses use expressions such as knowingly voluntarily fraudulently, dis honestly or in good faith In cases when it is intended that in order that an act may be a crime it should be done with a specific knowledge or in tention the definition proceeds to state exactly what the person concerned should have known or intended For example a person is said to cheat another per son if he by deceiving any person fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property [41] The statement of the elements of the offence of voluntarily causing hurt carries us a step further The definition of that offence provides as an element the specific know ledge that a person must have in order to be guilty of that crime A person is said voluntarily to cause hurt to another person if he does any act with the intention of thereby causing hurt to any person or with the knowledge that he was likely thereby to cause hurt to any person and does thereby cause hurt to any person

[41] Indian Penal Code s 415

How do we know the meaning of these expressions used in describing the necessary state of mind of the offender? When is a person said to act dishonestly or fraudulently or in good faith? The Code has taken care to define these terms in a chapter headed General Explanations A person is said to do a thing dishonestly if he does it with the intention of causing wrongful gain or wrongful loss to another person Wrongful gain is gain by unlawful means of property to which the person gaining is not legally entitled The opposite of it is wrongful loss being loss caused by unlawful means of property to which the person losing it is legally entitled[42] A thing is done fraudulently if it is done with intent to defraud but not otherwise[43] But the term defraud is not defined in the Code As to good faith the Code provides that nothing is said to be done or believed in good faith which is done or believed without due care and attention Thus did the authors of the Code try to prevent captious judges from wilfully misunderstanding the Code and cunning criminals from evading its provisions[44]

Though the basic ideas underlying these expressions are not dissimilar to the English understanding of these terms the Code has invested some of them with a special meaning Under the Indian General Clauses Act[45] a thing is deemed to be done in good

[42] Indian Penal Code ss 23 24
[43] *Ibid* s 25
[44] Whitley Stokes *Anglo Indian Codes* Vol 1 pp 10 11
[45] Act X of 1897 s 3 (22)

faith where it is in fact done honestly whether it is done negligently or not That is a definition borrowed from an English statute[46] But the Code has defined good faith negatively and emphasised not the honesty of the action but the care and attention with which it is done Notwithstanding however these differences owing no doubt to the fundamental notions which underlie these expressions Indian courts have on occasions referred to English decisions in interpreting them

MENS REA

The recognition of a mental element in criminal liability is inherent in the English common law The traditional maxim *actus non facit reum nisi mens sit rea* expresses it has been said a cardinal doctrine of English law[47] Lord Kenyon C J said that the maxim was a principle of natural justice and of our law The intent and the act must both concur to constitute a crime The maxim accepted in the English courts for centuries recognises it is said that there are two necessary elements in crime a physical element and a mental element At common law no man may be found guilty of crime unless in addition to an overt act which the law forbids or default in doing some act which the law enjoins he had at the time a legally

[46] (45 & 46 Vict c 61) Bills of Exchange Act 1882 s 90
[47] Younghusband v Luftig [1949] 2 K B 354 370 Goddard L C J

reprehensible state of mind that is to say *mens rea* or a guilty mind[48]

As was observed by Wills J The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong That intention may belong to one or other of two classes It may be to do a thing wrong in itself and apart from positive law or it may be to do a thing merely prohibited by statute or by com mon law or both elements of intention may co-exist with respect to the same deed[49] It would appear however, that with modern statutes which define with precision the elements in an offence and consi derations of policy which make it necessary to treat even innocent acts as crimes the application of the maxim is not so universal as it was at one time Said Wills J in the same case that Although prima facie and as a general rule there must be a mind at fault before there can be a crime it is not an inflexible rule and a statute may relate to such a subject mat ter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not There is a large body of municipal law in the present day which is so conceived Whether an enactment is to be construed in this sense or with the qualification ordi narily imported into the construction of criminal

[48] Kenny s *Outlines of Criminal Law* *op cit* pp 12 13 35 Halsbury 3rd ed Vol 10 pp 272 273 para 505

[49] *The Queen v Tolson* (1889) 23 Q B D 168 185 186 187

statutes that there must be a guilty mind must I think depend upon the subject matter of the enactment and the various circumstances that may make *the one construction* or the other reasonable or unreasonable The true position in regard to *mens rea* in statutory offences would appear to be as stated in Halsbury [50] A statutory crime may or may not contain an express definition of the necessary *state of* mind A statute may require a specific intention malice knowledge wilfulness or recklessness On the other hand it may be silent as to any requirement of *mens rea* and in such a case in order to determine whether or not *mens rea* is an essential element of the offence it is necessary to look at the objects and terms of the statute In some cases the courts have concluded that despite the absence of express language the intention of the legislature was that *mens rea* was a necessary ingredient of the *offence* In others the statute has been interpreted as creating a strict liability irrespective of *mens rea*

Unlike in England all offences in India excepting contempts of the courts of record like the Supreme Court and the High Courts are statutory The offences defined in the Penal Code and also in various other statutes incorporate in the definition of the offence itself the guilty mind needed in order that the crime may be committed *Under the English* common law *mens rea* may vary from crime to crime So does it vary in the Indian statutory defn [illegible] of

50 Halsbury *Laws of England* 3rd ed [illegible]
para 508

crime What the Indian Code seems to have done is to incorporate into the common law crime the *mens rea* needed for that particular crime so that the guilty *intention is generally to be gathered not from the common law but from the statute itself* This may be regarded as a modification of the common law worked into the Code by Macaulay and his colleagues to make it suit Indian conditions By adopting this course they have also avoided the doubt and obscurity which has not infrequently arisen in regard to the *mens rea* required for certain common law crimes like homicide assault and false imprisonment It has been pointed out that the English system in which changes in the law are made gradually by judicial decisions has often created a situation in which old and new doctrines have been employed in the course of the same period according as the judges are inclined one way or the other giving rise to conflicting principles with puzzling results[51] Such uncertainty cannot exist in India as the necessary guilty mind is indicated in the statutory definition of the crime

In a sense, therefore it may be said that the maxim *actus non facit reum nisi mens sit rea* has as a maxim no application to offences under the Code By specifying the varying guilty intention for each offence the Code has in effect built the maxim into each of its definitions and given it statutory effect Where the Code omits to indicate a particular guilty intent the presumption having regard to the general frame of the definitions would be that the omission

[51] Kenny *Outlines of Criminal Law op cit* p 25

must be intentional In such cases it would perhaps not be permissible to import the maxim in arriving at a conclusion whether the person charged with that particular offence has been guilty

Where statutes do not specify the requirement of a particular intent of a guilty mind or are silent the courts in India have followed the rule applied in England to the construction of such statutes

In a case where a master was held criminally liable for the default of his servant in charging a price above the maximum fixed under one of the Defence of India Rules the High Court took the view that even if the master had not been proved to have known of the unlawful act of the servant he would still be liable on the ground that where there is an absolute prohibition no question of *mens rea* arises The Judicial Committee of the Privy Council expressed its dissent from this view and quoted the observations of Lord Goddard Lord Chief Justice[53] It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of crime the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind The Privy Council also quoted with approval the observations of Wright J in *Sherras* v *D Rutzen*[54] in regard to the

[52] *Srinivas Mall* v *Emperor* A I R [1947] P C 135 139
[53] *Brend* v *Wood* (1946) 110 J P 317
[54] [1895] 1 Q B 918 921

limited and exceptional classes of offences which alone can be held to be committed without a guilty mind Said Wright J There is a presumption that *mens rea* intention or a knowledge of wrongfulness of the act is an essential ingredient in every offence but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals and both must be considered

Exemptions from Liability

The exemptions from criminal liability grouped in some of the English books under the heads of the Grounds of defence or Variations in liability are called general exceptions by the Penal Code These enumerate cases in which an act which would normally be an offence would by reason of the special circumstances in which the act is done not be an offence Among these are also included cases in which there is a want of what some of the English books call criminal capacity by reason of the mental or physical condition of the person who does the act The scheme of these general exceptions is to put together in a series of sections the circumstances surrounding an act which would prevent it from being a crime or state the peculiar situation of the person doing the act which makes him incompetent to commit a crime It is then provided that

nothing done in those circumstances or by a person in such a situation is a crime[5]

The general exceptions in the Code by and large include most of the familiar exemptions from liability known to common law such as mistake ignorance accident and consent and also the heads of want of criminal capacity like infancy insanity drunkenness and coercion Some however of the exemptions which were inapplicable to Indian conditions like those relating to husband and wife and privileged persons are omitted Yet other exceptions based on reasons special to India like that based on the right of private defence of the body and of property, have been added or enlarged It is interesting to notice how closely some of the exemptions from liability resemble those under English common and statute law

Before however we proceed to deal with some of them their general nature can be illustrated by taking homicide which is an offence under section 299 of the Code and examining how the exemptions enacted work in relation to that offence Homicide will not be an offence if death is caused by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution"[6] It will be excused if it is caused by a child under seven years of age or by a child above

55 Indian Penal Code Chap IV s 76 and the following sections
56 Indian Penal Code s 80

seven and under twelve years of age who has not attained sufficient maturity of understanding or by a person of unsound mind or by a person under intoxication and incapable of knowing the nature of the act[57] Again homicide will not be an offence if it is caused unintentionally by an act done in good faith for the benefit of the person who dies when the person who has died or if he is a minor or a lunatic his guardian has consented to the doing of the act[58] Nor will it be an offence when death occurs by reason of an act done to a person for whose benefit it is done in good faith even without that person s consent if the circumstances are such that it is impossible for that person to give his consent[59] Homicide will also be justified in the following cases if it is caused by a person who by reason of a mistake of fact in good faith believes himself bound by law to do it[60] by a judge when acting judicially in the exercise of any power which is or which in good faith he believes to be given to him by law[61] by a person acting pursuant to a judgment or order of a court of justice[62] by a person who is justified by law or who by reason of a mistake of fact in good faith believes himself to be justified by law for example the causing of death in the apprehending of a murderer in the act[63] by a person acting without any

[57] *Ibid* ss 82 83 84 85
[58] *Ibid* ss 87 88 and 89
[59] Indian Penal Code s 92
[60] *Ibid* s 76
[61] *Ibid* s 77
[62] *Ibid* s 78
[63] *Ibid* s 79

criminal intention to cause harm and in good faith for the purpose of preventing or avoiding other harm to person or property[64] Finally as every person has a right subject to certain restrictions to defend his own body or the body of any other person against any offence affecting the human body and his property against certain offences against property no offence of homicide will be committed if death is caused in the exercise of such a right of private defence of person or property[65] It will be recognised that almost all these exceptions excepting in a certain measure that based on the right of private defence are in a smaller or greater degree exemptions in English law

Infancy Moral delinquency is as a general rule a prerequisite of all crime Realisation of the consequences of their acts cannot generally be imputed to young children A line based on their age has therefore to be drawn between the immunity and the liability of children for criminal acts Under the Penal Code a child under seven years of age is deemed incapable of committing an offence[66] In England a child under eight years of age is exempt from liability for a crime[67] The Indian Code further provides that a child above seven and under twelve years of age will not be deemed to have committed an offence if the child has not attained sufficient maturi

[64] *Ibid* s 81
[65] *Ibid* ss 96 to 103
[66] s 82
[67] Children and Young Persons Act 1933 (23 & 24 Geo 5 c 12) s 50

ty of understanding to judge of the nature and con sequences of his conduct on the particular occasion[68] The requirement of the Indian Code has been often expressed in England by the phrase *malitia supplet aetatem* which means that malice makes up for the want of age Malice would in this context seem to mean knowledge that the act is morally as well as legally wrong Sometimes the same idea is expressed by the words mischievous discretion[69] In Eng land a child of eight years or more but under the age of fourteen years is presumed to be incapable of committing a crime Common law regards a boy under fourteen years of age to be physically incapa ble of committing the crime of rape[70] and judges have repeatedly refused to receive evidence that an accused person under that age was in fact capable of committing the offence The law in India knows of no such presumption In each case it becomes a question of fact to be determined with reference to the person charged[71]

Insanity An insane person will be regarded as in capable of committing a crime only if at the time of committing the act he was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act or as not to know that what he was doing was wrong In substance criminal law gives protection to an insane

[68] s 83
[69] *R* v *Elizabeth Owen* (1830) 4 C & P 236
[70] *Frank Tatham* (1921) 15 Cr App R 132
[71] *Emperor* v *Paras Ram Dube* A I R (1915) All 134 Ratanlal *Law of Crimes* 18th ed 161

wrong or contrary to law is in substance based on the principle laid down in that case[73]

Drunkenness At common law a person who becomes drunk as a result of his own voluntary act is not excused from criminal liability by reason of his drunkenness alone for a person though drunk may be capable of forming an intention and therefore of committing a crime[74] The position in India is not different The law provides that the act of a person who at the time of doing it is by reason of intoxication incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law will not be an offence only if the thing which intoxicated him was administered to him without his knowledge or against his will

Mistake In England excepting in the cases where proof of *mens rea* is unnecessary a bona fide mistake as to matters of fact would be available as a defence to a crime But ignorance of law cannot be a defence[75] In substance mistake as a defence to criminal liability at common law must amount either to the absence of *mens rea* in the accused or where the act so warrants the accused is treated as though his harmful deed had not been an *actus reus* The latter may be illustrated by the case of a person seizing another whom he reasonably though mistakenly supposes to be committing a murder in order

[73] Indian Penal Code s 84 Ratanlal *Law of Crimes* 18th ed pp 162 163

[74] Halsbury *Laws of England* 3rd ed Vol 10 p 283 para 535

[75] *Ibid* p 284 para 525

to bring him before the proper authorities though it may in fact turn out that the person seized was acting in self defence This indeed is the illustration which is to be found in the provisions of the Indian Code relating to the general exception of mistake[76] As a rule however mistake negatives *mens rea* rather than *actus reus* In some cases *ignorantia facti* is a good defence for such ignorance many a time makes the act itself morally involuntary[77] Mistake however must be of such a nature that had the circumstances supposed to have existed by the person acting been real they would have prevented liability attaching to the person doing the act It would be no defence if the supposed act would itself be unlawful The mistake must also be a reasonable one Finally the mistake however reasonable must relate to matters of fact and not to matters of law Mistake as an exception to criminal liability has under the Indian Code in substance the same requirements[78] The law provides expressly that the mistake has to be a mistake of fact and not a mistake of law and the person doing the act should have done it in good faith which as we have seen imports due care and attention That requirement introduces the idea that the mistake must as in English law be a reasonable one A statute may of course expressly or by implication exclude the defence of mistake In

[76] s 79
[77] 1 Hale P C 42 Kenny *op cit* p 47 note 2
[78] ss 76 79

such cases the exemption from liability will not be available in India as well as in England

Husband and Wife The presumption existed at common law in the case of certain crimes that where a crime was committed by a wife in the presence of her husband the wife acted under the coercion of the husband [79] The wife was supposed to be subject to such powerful influences by the husband that she was in some cases which were not defined, excused on the assumption that she was acting under the husbands influence [80] There was also assumed to be such a community of interest between them that neither could bring any criminal charge against the other except in regard to personal injuries inflicted by the one upon the other [81] Nor could a husband and wife in England be convicted of conspiracy if they were the only parties to it [8]

The law however in England has been substantially altered since the days of the enactment of the Indian Penal Code The Larceny Act of 1916 which re-enacts section 12 of the Married Womens Property Act 1882 provides that spouses may be convicted of stealing each others goods when they are living apart or when the taking is effected with a view to their doing so [83] The irrebutable presumption that

[79] Halsbury *Laws of England* 3rd ed Vol 10 p 291 para 542
[80] Stephen *Dig Crim Law* Art 30 *Brown v Att Gen for New Zealand* [1898] A C 234
[81] *The Queen v The Lord Mayor of London* (1886) 16 Q B D 772 a case of private libel
[8] *Laila Jhina Mawji v The Queen* [1957] A C 126
[83] s 36

a woman who committed an offence in the presence of her husband was acting under his coercion and that she incurred no criminal liability was taken away in *1925* Yet even today in England it is a good defence for the woman except in cases of treason or murder to prove that she was in fact coerced by her husband in whose presence the crime was committed[84]

None of these principles has at any time applied in India The husband and wife do not in India constitute one person as in England before the Married Women s Property Act *1882* for the purpose of criminal law and they would be liable for theft for removing each other s property with a dishonest intention[85] This difference between the English common law and the Indian Code derives from the fact that neither under the Hindu nor the Mahomedan law there exists for the purpose of criminal law the presumption that a husband and wife constitute one person It may be said that the framers of the Indian Code were in this respect well ahead of the English law

There is in India a provision which exempts the wife only from liability from the crime of harbouring her husband who is a deserter from the army navy or air force[86] Neither a husband nor a wife incurs criminal liability by harbouring the other spouse who has committed an offence or who has

[84] Criminal Justice Act 1925 (15 & 16 Geo 5 c 86) s 47
[85] Ratanlal *Law of Crimes* 18th ed p 945
[86] Indian Penal Code s 136

escaped from custody[87] These provisions may be compared to what English law provides in regard to the wife who is protected if she hides the husband from justice after he has committed an offence even though the offence be one of treason This is said to be based on a wife s duty to aid her husband and to keep his secrets This protection it appears, however will not apply where there are special statutory provisions to the contrary as in the case of a deserter from the army[88] A husband however does not enjoy a similar exemption when he assists a felonious wife[89]

Heads of State and other privileged persons Among the legally abnormal persons in criminal law are included the heads of foreign States the ambassadors of foreign countries their families secretaries and other attachés and employees of the legation who enjoy immunity from criminal jurisdiction[90] It is not certain whether this immunity which is asserted by writers on international law is sanctioned by the English courts Assuming however that this diplomatic immunity from jurisdiction exists it is capable of being waived[91] In England there are however various statutory provisions conferring diplomatic

[87] *Ibid* ss 212 216 and 216A
[88] Army Act 1881 s 153 (1)
[89] Kenny *op cit* p 90
[90] Oppenheim s *International Law* 8th ed Vol 1 pp 790 792 809 810 812
[91] Halsbury *Laws of England* 3rd ed Vol 10 p 292 para 541

immunities from civil and criminal liability to ambassadors and diplomatic staff[92]

Though some provisions have been made in the Indian Procedural Code in regard to the immunity of privileged persons from civil proceedings no specific statutory provision is to be found in India conferring immunity from criminal jurisdiction on the heads of foreign States ambassadors and diplomatic staff Notwithstanding the absence of such provisions well established rules of international law and judicial decisions in England are however in this respect applied in India One of the directive principles in the Indian Constitution provides that the State shall endeavour to maintain just and honourable relations between nations and foster respect for international law in the dealings of organised peoples with one another[93]

Self Defence It has often been stated that in England death inflicted by a man in self defence against an unlawful attack would be a case of justifiable homicide But Blackstone pointed out that this was too wide and based upon misconception for such a homicide could only be justified when the attack resisted was itself a felonious one and in such cases the homicide would be justified by the fact that it was effected in order to prevent a capital felony Homicide in self-defence would therefore be caught

[92] Diplomatic Privileges Act 1708 (9 Anne c 12) Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952 (15 & 16 Geo 6 & 1 Eliz 2 c 18) Diplomatic Immunities Restrictions Act 1955 (4 Eliz 2 c 21)
[93] Indian Constitution Art 51

by the ancient rule of strict liability and the killer could only be saved by the kings mercy[94] Nowa days of course homicide in reasonable self-defence does not involve the killer in any legal liability

In India however the Penal Code in terms declares that every person has subject to certain restrictions mentioned in the statute a right to private defence of the body against offences affecting the human body and against certain offences relating to property[95] The right of private defence in no case extends to inflicting more harm than is necessary for the purpose of defence Nor is there a right of private defence in cases in which there is time to have recourse to the protection of the public autho rities The right of private defence cannot be avail ed of against acts done by a public servant or under the direction of a public servant acting in good faith under colour of his office even though the act may not be strictly justifiable in law if the act does not reasonably cause apprehension of death or grievous injury[96]

The justification given by the authors of the Code for enacting the right of self defence in somewhat liberal terms is interesting It may be thought that we have allowed too great a latitude to the exercise of this right and we are ourselves of opinion that if we had been framing laws for a bold and high spirited people accustomed to take the law into their

[94] Kenny *op cit* pp 112 113
[95] Indian Penal Code s 97
[96] *Ibid* s 99

own hand and to go beyond the line of moderation in repelling injury it would have been fit to provide additional restrictions In this country the danger is on the other side the people are too little disposed *to help themselves* *Under these circumstances* we are desirous rather to rouse and encourage a manly spirit among the people than to multiply restrictions on the exercise of the right of self-defence [97]

Provocation For many centuries the common law has recognised that if it be proved that the misdeed was done under the influence of irresistible impulse the criminal liability though not entirely removed may be reduced Thus there would be a lesser liability if an intentional homicide is committed by a person who has been so provoked by an attack made upon him that he has suddenly and temporarily lost his self-control and has done the act in the ungovernable passion of the moment Thus Coke drew a distinction between an intentional killing in hot blood and an intentional killing when the blood was cool (a killing *sedato animo*) speaking of the latter as covering a case where one killeth another without any provocation on the part of him that is slain [98] The earlier authorities sometimes confused homicide under provocation with homicide in self-defence because in those days the consequences were much the same in either case Now however though homicide in reasonable self-defence does not involve criminal liability if the act is done under provoca

[97] Whitley Stokes *Anglo Indian Code* Vol I p 17
[98] Kenny *op cit* p 132

tion it will still be the felony of manslaughter punishable with a maximum of imprisonment for life[99]

In India it is provided that liability will not attach for the graver offence of murder to a person who commits homicide whilst deprived of the power of self-control by grave and sudden provocation and causes the death of either the person who gave the provocation or of any other person by mistake or accident Anything done by a public servant in the lawful exercise of his powers or by any person in the lawful exercise of the right to private defence will not amount to provocation Nor will a person who seeks the provocation as an excuse for killing or doing harm to any person be protected on the ground of this exceptional liability In England mere words or gestures not accompanied by anything of such a serious character as a blow will not be sufficient to reduce the crime to manslaughter The authors of the Indian Code however refused to draw such a distinction stating that they greatly doubted whether any good reason could be assigned for it They observed It is an indisputable fact that gross insults by word or gesture have as great a tendency to move many persons to violent passion as dangerous or painful bodily injuries nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain [1] In Indian law provocation reduces liability not only in regard

[99] *Ibid* p 132
[1] Ratanlal *op cit* 18th ed p 728

own hand and to go beyond the line of moderation in repelling injury it would have been fit to provide additional restrictions In this country the danger is on the other side the people are too little disposed to help themselves Under these circumstances we are desirous rather to rouse and encourage a manly spirit among the people than to multiply restrictions on the exercise of the right of self-defence [97]

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[97] Whitley Stokes *Anglo Indian Code* Vol I p 17
[98] Kenny *op cit* p 132

tered in the Code in various provisions under the name of harbouring an offender[3] The steps towards the commission of a crime which are called by some writers preliminary" or inchoate crimes like incitement and conspiracy fall in Indian law under the head of "Abetment" An attempt to commit a crime is treated separately

Abetment A person who does not actually commit the crime may help to bring it about and thereby be guilty of the offence of abetment or in the language of English law be an accessory before the fact He may do so by instigating it, by engaging in a conspiracy to do it or by aiding in the doing of it.[4] The offence of abetment would be committed if the person charged had instigated another in order that that person may instigate a third person to commit an offence The instigation must be with the object that ultimately someone will be influenced to commit the offence The importance of abetment of a crime by a conspiracy has greatly diminished since the enactment in 1913 of a provision creating a substantive offence of criminal conspiracy which has been defined as an agreement between two or more persons to do an illegal act or an act which is not illegal by unlawful means[6] This amendment brought the law in India nearer in this respect to the law in

[3] Ratanlal *op cit* PP 236 237
[4] Indian Penal Code s 107
[5] *Ibid* s 108 Exp 4 and the illustration 9 St Tr 931 at 965
[6] *Ibid* s 120A

to homicide but also in regard to lesser offences like grievous or simple hurt or assault a lesser punishment being awarded to the offender The provocation has however in each case to be sudden and grave

Degrees of criminality A person may incur criminal liability in respect of an offence in various ways He may personally commit it He may participate in its commission though he does no act himself He may set some other agency to work with a view to the commission of the offence or he may help the offender after the act with a view to screening him from justice These modes or degrees of complicity in crimes are treated in English law under the head of principals in the first or second degree and accessories before or after the act It would appear that the word principal in criminal law suggests the very converse of what one would understand by it in the law of contract The accessory in criminal law proposes an act and the principal carries it out while in the law of contract and tort the principal authorises the act and the agent carries it out[3]

In the Indian Code the different degrees of complicity in crime are based on the manner in which the person charged has become associated with the crime There is no distinction as in England between principals in the first and second degree An abettor in Indian law corresponds closely to an accessory before the fact in English law The provisions corresponding to an accessory after the fact are scat

[3] Kenny *op cit* p 89

When however this is not so an attempt to commit a crime is treated as a misdemeanour at common law

The Indian Code contains a chapter dealing with attempts to commit offences Under the Indian Code attempts to commit offences are sometimes made crimes by the provision dealing with the commission of the offence itself One may illustrate this by a reference to the offence of waging war against the Government of India It is provided that who ever wages war against the Government of India or attempts to wage such war or abets the waging of such war shall be punished in a certain manner[9] Apart from such provisions there is a general provision dealing with attempts to commit offences which have not been made punishable under specific provisions[10] This general provision makes it clear that in order that an attempt may be a crime an overt act is necessary in India as in England A person will not incur criminal liability for attempting to commit an offence unless he does any act towards the commission of the offence Thus an attempt becomes a crime only when it reaches a point at which an act is done towards the commission of the offence A man cannot be punished merely for having formed a design to commit a crime He can be punished only when he does something definite in pursuance of his design He would then be punished as if the crime towards the commission of which he had done an overt act had been committed

[9] Indian Penal Code ss 121 125 and 39
[10] *Ibid* s 511

England[7] Under the Indian law a person is said to abet an offence by aiding it if he does an act or omits to do an act before or at the time of its commission and thus intentionally facilitates its commission

Attempt An attempt necessarily implies an intention to achieve a result which the person doing the act has failed to bring about It may be said that an attempt implies intention in action An attempt is an overt act It differs from the attempted crime in this that the act has failed to bring the desired result [8] To constitute an attempt at common law there has to be an overt act as well as *mens rea* Any overt act of preparation committed after the intention to commit the crime has been formed and tended towards the commission of it is an attempt to commit it In any case when the connection between the overt act of preparation and the commission of the crime is clear the fact that the attempt has been frustrated does not prevent it from creating a criminal liability It has been sometimes urged that on principle an attempt which could not possibly succeed should not be regarded as a criminal attempt and should not be punishable It would however now appear well established that the impossibility of performance does not *per se* render the attempt harmless In England it appears that many attempts to commit crimes are themselves treated as crimes special punishments being provided for them

[7] Mayne *Criminal Law of India* 4th ed Pt II p 247 Kenny *op cit* p 339
[8] Holmes *Common Law* p 65

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[9] Indian Penal Code ss 121 125 and 39
[10] *Ibid* s 511

Naturally very often the question arises at what stage on the way to a completed offence does a person act towards the commission of it[11] The difficulty in judging whether there has been an attempt punishable as a crime is the same in England as in India It may be that some acts may be attempts or misdemeanours even though they could not have resulted in a crime unless followed by other acts on the part of the wrongdoer[1] One may illustrate this by a reference to the case where a man was convicted of a criminal attempt when he had lighted a match with intent to set fire to a haystack though he blew it out on seeing that he was watched[13] The position in India is not different and there have been numerous decisions which have drawn a line between what may be regarded as mere acts of preparation and overt acts which amount to an attempt The Indian courts have applied the well accepted principle that the law can afford to disregard a mere criminal intent but that it must intervene when the intent is accompanied by acts which are sufficiently proximate to the crime attempted

PUNISHMENT

It may perhaps be said that the Indian Code takes much greater care than English law to differentiate between the possible shades of offences and to gradu

[11] Mayne *Criminal Law of India* 4th ed Pt *II* p 9 b
[1] Holmes *Common Law* pp 66 67
[13] *R* v *Cross* (1859) 1 F & F 511

ate the maximum punishment for each offence In a system of punishment so framed necessarily much less is left to the discretion of the judge[14] Both the English and Indian law have progressed in the mat ter of punishment In England the Criminal Justice Act of 1948 has provided in effect that any court may fine an offender convicted for felony (not being felony for which the sentence is fixed by law) in lieu of or in addition to dealing with him in any other manner that the court may have power to do[15] This indeed was the law enacted as far back as 1860 in the Indian Code The absence of a fine as a general punishment for felony was a difference between Indian and English law[16] On the other hand the Indian Code continued to have forfeiture of property as a punishment for certain political offences and offences punishable with death till 1921 when it was abolished by the repeal of certain sections of the Code[17] In England forfeiture for felony and trea son were abolished as early as 1870[18] The abolition of the punishment of whipping in most cases in England by the Criminal Justice Act of 1948 was followed by similar legislation in India in 1955[19]

[14] Sir Ronald K Wilson *Comparative Tables of English and Indian Law* 1890 (London) p 12

[15] Kenny *op cit* p 513

[16] Sir Ronald K Wilson *op cit* p 6 item 3

[17] Indian Penal Code ss 61 62 (repealed by Act 16 of 1921) Ratanlal *op cit* p 85

[18] Forfeiture Act 1870 (33 & 34 Vict c 23) Kenny *op cit* p 91

[19] Criminal Justice Act 1948 s 2 Abolition of Whipping Act 1955

Thus in some cases where the Indian Code was precise and ahead of the common law English statutes have subsequently supplemented the common law In other matters where the Indian Code had lagged behind English common and statute law legislation in India has tried to keep pace with the developments in England

A provision in the Indian Code deserves notice because of its similarity to the provision in the English Bill of Rights that excessive fines ought not to be imposed It reads Where no sum is expressed to which a fine may extend the amount of fine to which the offender is liable is unlimited but shall not be excessive [9]

Procedure Code not only gives the right to make complaints to private persons but it makes it incumbent on the public to give information to the police of the commission or the intended commission of certain offences.[21] The duty of aiding magistrates and police officers in making arrests and in preventing certain offences is also laid on the public.[22] The Code also entitles private persons to arrest persons in certain cases and make over persons so arrested without unnecessary delay to a police officer.[23] The law enjoins all persons to attend before magistrates and police officers to give evidence about the commission of offences within their cognizance whenever called upon to do so.[24]

Large powers have been entrusted to the police for conducting investigations into offences stated to have been committed. Offences are for this purpose divided broadly into two classes called cognizable and non-cognizable. The broad distinction between these two classes of offences is that though a police officer on receipt of information of the commission of a cognizable offence has the power to commence an investigation and to make arrests, he has no such power in the case of non-cognizable offences unless the investigation is authorised by a competent magistrate. The Code has placed upon every police officer

[21] Criminal Procedure Code, 1898, s. 44.
[22] *Ibid.*, s. 42.
[23] *Ibid.*, s. 59, *cf.* *Walters v. W. H. Smith & Son* [1914], 1 K.B. 595.
[24] Criminal Procedure Code, ss. 90, 160.

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Criminal Procedure

A glimpse at the manner in which those who have committed crimes are brought before the courts in India and tried by them will complete the picture of the broad similarity of the working of the system of criminal law in England and India

The repression of crime being a matter of serious importance to the community the Indian law provides that offences may be brought to the notice of the authorities either through the agency of the police whose duty is to enforce law and order or by private persons Cases may be started before the criminal courts either on reports made by the police or on complaints lodged by private persons The

[20] Indian Penal Code s 63

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the general duty to interpose and prevent to the best of his ability the commission of any cognizable offence

As cognizable offences are offences of a serious nature the Code requires the police to investigate *them on their own authority the need for immediate* action being imperative in such cases During the course of their investigation the police are empower ed to make searches order production of documents and things seize any suspicious property call wit nesses requiring them to attend any court and arrest without warrant on their own responsibility persons suspected of having been guilty of the offence In such cases the investigation results in a police report upon which proceedings in respect of the offence are initiated before a magistrate In dealing with non cognizable offences the police would have no such powers unless an investigation is ordered by a magistrate On complaints by private persons the magistrate if he is satisfied that there is a case for inquiry directs the police to make a preliminary investigation before permitting proceedings upon the complaint to be adopted Apart from conducting investigation the police also have powers to anti cipate offences which are intended to be committed and take steps to prevent them [25]

As crime is a wrong to society generally the right to initiate criminal proceedings in respect of it belongs not only to the party injured but to all other persons who may be cognizant of the commis

[25] Criminal Procedure Code ss 149 153

sion of the crime The State as the representative of the community is the real prosecutor in all criminal proceedings A criminal proceeding is therefore not permitted to abate by reason merely of the absence or death of a complainant [26] Nor is there unless the statute expressly so provides a period of limitation for the institution of proceedings in respect of a crime [27] The right to start criminal proceedings is however restricted to the person aggrieved in regard to certain offences such as defamation offences against marriage marital misbehaviour and adultery [28] Proceedings cannot be started in respect of offences which relate to the contempt of the authority of a public servant offences against public justice and similar matters unless a complaint is lodged by a person in authority or the sanction of a specified authority has been obtained [29]

The Indian law makes a provision for the compounding with or without the permission of the court of certain offences [30] In respect of these offences particularly in the case of those which can be compounded without permission the criminal proceedings may be regarded as being in the nature of personal actions the complainant being competent to put an end to them This would seem to be different in England where a prosecution settled and

[26] *Ha ara Singh* v *Emperor* (1922) 22 Cr L J 166
[27] *Queen Empress* v *Vageshappa Pai* (1895) I L R 20 Bom 543
[28] Criminal Procedure Code ss 198 199A
[29] *Ibid* ss 195 196 197
[30] *Ibid* s 345

abandoned by the original prosecutor may be taken up by the Attorney General or even by a private person[31]

The manner of trial of offences varies broadly speaking according to the seriousness of the offence The more serious the offence the greater the elaborateness of the procedure No sentence of imprisonment exceeding three months can be passed in cases tried in a summary manner Offences which merit a severer punishment are tried as warrant cases with a more detailed procedure Offences of a still graver nature can only be tried by a court of session or a High Court and a special procedure is provided[32]

There is also a hierarchy of courts for dealing with criminal offences Describing the English system of criminal courts the Law Commission of India in a recent report observed The above description shows that our system of criminal courts is substantially similar to the English system[33]

The Trial The fundamental principles which govern the trial of a person accused of crime under the British system of jurisprudence also obtain in India As in England it is for the prosecutor to *prove the charge that has been laid against the accused* The proof must be beyond reasonable doubt[34]

[31] *R v Wood* (1831) 3 B & Ad 57 Kenny *op cit* p 539
[32] Criminal Procedure Code 1898 chaps 22 23
[33] Report of the Law Commission Vol II p 719
[34] Halsbury 3rd ed Vol 10 p 436 para 809 Sarkar *The Indian Evidence Act* 19th ed I p 29 789 and decisions noted there

The courts are to be open to the public[35] The witnesses have to give their evidence in the presence of the accused person[36] and the accused has the right to cross examine them after they have been examined by the prosecutor[37] The accused or his advocate is entitled to urge arguments in his defence Once the court comes to a decision of acquittal or conviction the accused cannot be charged again with the same offence[38] As in England the public prosecutor is regarded as a representative of the State a minister of justice assisting in its administration He has no interest in procuring a conviction He is concerned only that the truth should be known and that the real offender be convicted[39] A judge may not be personally interested in the cases which he tries the maxim being *Nemo debet esse judex in propria sua causa*[40]

It may truly be said that not only does the mode of trial in India assure to the accused a fair deal as in England but the manner and procedure of trial are but a modification of the English system suited to Indian conditions It has been said that freedom is not so much a matter of the formulation of sonor

[35] Criminal Procedure Code s 352
[36] *Ibid* s 353
[37] Indian Evidence Act s 138 Criminal Procedure Code s 256
[38] Criminal Procedure Code s 403
[39] *R* v *Puddick* (1865) 4 F & F 497 499 Halsbury 3rd ed Vol 10 p 416 para 761 Kenny *op cit* 505 cited Lord Hewart C J *Ram Ranjan Roy* v *Emperor* A I R (1915) Cal 545
[40] Criminal Procedure Code s 556 *Serjeant & Ors* v *Dale* (1877) 2 Q B D 558 567

ous abstractions as of protecting the rights of each single person in the State The test of freedom lies in the rights of the individual and in the readiness *of the law—particularly the criminal law—to up* hold them [41] As we shall see later the Indian Bill of Rights guarantees to the individual his freedom The Indian Criminal law helps him to enjoy and uphold it

[41] F T Giles *The Criminal Law* 12

CHAPTER 4

THE INDIAN CONSTITUTION

THE structure of the Indian Constitution is said to be characteristically British The machinery of government is essentially British and the whole collection of British constitutional conventions has apparently been incorporated as conventions.[1]

The builders of the Indian Constitution not only drew largely from the collection of British ideas and institutions which was India s heritage from British rule but they also took care to maintain a continuity with the governmental system which had grown up under the British They believed not in severing their links with the past but rather in treasuring all that had been useful and to which they had been accustomed The structure which emerged was therefore not only basically British in its framework but took the form of an alteration and extension of what had previously existed A brief reference to the circumstances and the manner in which the Constitution came into being will clarify the situation

THE BACKGROUND

For about a hundred years before 1935 British India had been governed under a unitary system of govern

[1] Sir Ivor Jennings *Some Characteristics of the Indian Constitution* p 2

ment Acts for the government of India passed from time to time had prescribed the governmental machinery They had gradually liberalised it by introducing an Indian element into the legislatures and later in the executive The growing demand for transfer of power into Indian hands had led later to the introduction of a system of diarchy under which there was a partial delegation of legislative and executive power restricted to certain subjects to the provincial elected legislatures under the Act of 1919 Notwithstanding however the system of diarchy the Government of India continued under one central administration till the enactment of the Government of India Act 1935 That Act was the first attempt to establish a federal government in India

However the historical political and economic needs which create the urge to federalism were completely absent The unusual nature of the federation sought to be created by the Act of 1935 was fully recognised by its authors The report of the Joint Parliamentary Committee on Indian Constitutional Reforms stated "Of course in thus converting a unitary State into a federation we should be taking a step for which there is no exact historical precedent. Federations have commonly resulted from an agreement between independent or, at least autonomous Governments, surrendering a defined part of their sovereignty or autonomy to a new central organism At the present moment the British Indian Provinces are not even autonomous for they are

subject to both administrative and legislative control of the Government of India and such authority as they exercise has been in the main devolved upon them under a statutory rule making power by the Governor General in Council We are faced there fore with the necessity of creating autonomous units and combining them into a federation by one and the same act

This artificial federal scheme was devised mainly in order to provide and maintain conditions which would notwithstanding the transfer of political power into Indian hands enable Britain to maintain its hold over India Though the autonomous units created by the Act of 1935 began to function from 1937 the federation envisaged by the Act never came into existence

The year 1947 witnessed the fruition of the Indian struggle for freedom a bloodless revolution which brought about the transfer of power from British to Indian hands The manner in which this transfer was effected was in some respects unique The British Parliament which had governed the country for about a century abdicated and by the very statute by which it abdicated—the Indian Independ ence Act—it created a new dominion the Dominion of India The Act also contained a machinery for the framing of a new Constitution for India The Constituent Assembly formed under the Act was to prepare it The Assembly evolved the present Con stitution of the country after debates spread over three years Thus in a sense the Indian Constitu

tion of 1950 springs out of the parliamentary statute of 1947.

The Assembly had to make a difficult decision On one side was the history of a centralised government in India for over a hundred years under the British The experience of internecine divisions and centrifugal forces in the country pointed to the need for a strong central government such as a unitary state might well produce On the other side were the already existing partly autonomous provincial units the Indian states British paramountcy over which had lapsed and which had to find a place in the Indian polity and the federal structure in the Act of 1935 which attracted them to a federal state The lure of the Act of 1935 which contained the frame work of such a general government as could well be worked upon and turned into a federation suited to India's needs proved irresistible. India's adoption of a federal structure may thus be traced to the parliamentary statute of 1935.

This statute had, in making suitable provisions for the Government of India naturally drawn largely on the previous Government of India Acts of which it was the successor In fact it reproduced in some cases the language of some of the earlier Constitution Acts Its scheme was largely based on parliamentary legislation which had created federations in Canada Australia and South Africa That was the model on which the Constituent Assembly worked in fashioning the Indian Constitution

The fighters for Indian freedom who had assembled in the Constituent Assembly to shape the country's Constitution had no desire to make a break with the past. They were deeply conscious of the importance of continuity in so far as it could be maintained consistently with the country's desire for a republican form of government. A careful study was made of the constitutions of different countries all over the world in an endeavour to discover ideas and provisions which might suit Indian conditions and in a certain measure these were utilised. The fundamental rights in the Indian Constitution have been in the main inspired by the Constitution of the United States but they have been modified in the light of the experience of the United States and other countries. But the ground plan of the Indian Constitution is to be found in the parliamentary statute of 1935 which was the result of years of deliberation in India and in England and was based on the working of the Canadian and Australian Constitution Acts.

The Indian Constitution is a composite constitution comprising not only the Constitution of the federation, the Union of India, but also the constitutions of the constituent states of the Union. This resulted from the peculiar nature of the Indian federation to which we have already referred. The Indian federation did not arise like the Australian federation out of a pact between independent or autonomous states who wanted to come together for their mutual benefit in the matter of defence or their eco

nomy surrendering some of their sovereign or autonomous powers to the general government The Indian Provinces were before 1950 units formed on the basis of administrative convenience with little autonomy of their own though certain legislative powers had been devolved upon them by the central Government The Indian Constitution makers had therefore like the framers of the Act of 1935 to create simultaneously a general government and the constituent regional units It had also to provide for a distribution of power between the general and regional governments and for the manner in which the general and the regional governments were to function

The British influence on the Indian Constitution is not restricted to its being based upon the framework of the Act of 1935 It is far deeper and more extensive The Indian Constitution has drawn freely upon basic principles of English constitutional law It incorporates the principles of responsible government on the model of the British Cabinet system We also find in it a constitutional head the President, whose functions bear a close comparison to those of the King in England

Broad Features

Examining the interrelation of the executive and legislative powers in the Indian Constitution the Supreme Court of India stated that Our Constitution though federal in its structure, is modelled on

the British parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the state In the Indian Constitution therefore we have the same system of parliamentary executive as in England and the Council of Ministers consisting as it does of the members of the legislature is like the British Cabinet, a hyphen which joins a buckle which fastens the legislative part of the state to the executive part -

A broad survey of the structure of the general or Union Government under the Constitution will convince us that it is based on the British and the parliamentary system no doubt with some notable differences arising in part out of the basic difference that the Indian Union is a federal and not a unitary government

The Constitution divides the functions of the Union into the three categories of executive legislative and judicial functions following the pattern of the British North America Act and the Commonwealth of Australia Act Though this division of functions is not based on the doctrine of separation of powers as in the United States yet there is a broad division of functions between the appropriate authorities so that for example the legislature will not

² *Rai Sahib Ram Jawaya Kapur* v *State of Punjab* (1955) 2 S C R 225 236 237

be entitled to arrogate to itself the judicial function of adjudication The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption by one organ or part of the state of functions that essentially belong to another [3] This will no doubt strike one accustom ed to the established supremacy of Parliament in England as unusual In the course of its historical development Parliament has performed and in a way still performs judicial functions Indeed the expres sion Court of Parliament is not unfamiliar to English lawyers However a differentiation of the functions of different departments is an invariable feature of all written constitutions The very pur pose of a written constitution is the demarcation of the powers of different departments of government so that the exercise of their powers may be limited to their particular fields In countries governed by a written constitution as India is the supreme autho rity is not Parliament but the constitution Con trasting it with the supremacy of Parliament Dicey has characterised it as the supremacy of the constitu tion

The executive power of the Indian Union is vested in an elected head the President of India [4] He

[3] *Ibid* 235 236
[4] Indian Constitution Arts 52 53 and 54

holds office for a term of five years and may be removed from office by impeachment for violation of the Constitution The executive functions of the Union extend as in the Canadian Constitution to all matters with respect of which the Union Parliament may make laws[5] The President has to exercise his powers with the aid and advice of his Council of Ministers of which the Prime Minister is the head[6] The Prime Minister is appointed by the President and the members of the Council of Ministers are also appointed by him on the advice of the Prime Minister The Ministers are to hold office during the pleasure of the President and the Council of Ministers is to be collectively responsible to the House of the People[7] The House of the People is a part of the Parliament of the Union of India which consists of the President and two Houses the Council of States and the House of the People The House of the People corresponds to the House of Commons in England being elected directly by the people of India on an adult suffrage on a population basis The Council of States is in a way similar to the Upper House in England though it is almost wholly elected and has no hereditary element in it It is composed mainly of representatives elected by the Legislative Assemblies of the States constituting the Indian Union

[5] *Ibid* Art 73
[6] *Ibid* Art 74
Ibid Art 75

The President

The designation of the head as President and his being elected creates an impression that the President of India would have the powers of the chief executive in the American Constitution But the resemblance ends with the name given to the chief executive and the manner of his selection The Constitution no doubt assigns to the President numerous and most important functions Not only has he to perform functions as the chief executive of the Union Government but he is also a limb of the Union legislature Bills passed by the Houses of Parliament have to be presented to the President for his assent before they become law When a Bill is so presented he has to declare that either he assents to the Bill or he withholds assent therefrom He may also return certain Bills to the Houses of Parliament requesting their reconsideration The supreme command of the defence forces of the Union is vested in the President He has in that capacity powers in regard to the appointment discipline disposition and the use of armed forces The Constitution also vests in him power to create various statutory authorities in whom are vested the performance of different functions

However we must not forget that the Constitution requires the President to act with the aid and advice of his Council of Ministers This may be said to be one of the key provisions of the Constitution The phraseology has been borrowed from

informally so that he may make his views known without rejecting or suspending action on formal advice In the long run he may either accept the advice or find a new method but his views ought to carry weight and may modify the advice he receives The Indian Constitution requires the Prime Minister to communicate to the President all decisions of his Cabinet furnish to him all the information he may call for and if so required by the President submit for the consideration of his Cabinet any matter on which a decision has been taken by a Minister and which has not been considered by the Cabinet[8] These provisions contemplate the Prime Minister as representing the Council of Ministers being the channel of communication between the President on the one hand and the Council of Ministers on the other These appear to be the means by which the President may do the persuading The close analogy between the President of the Indian Union as its constitutional head and the sovereign in Great Britain is apparent Healthy conventions enabling the President to exercise the weight and influence which should legitimately belong to the constitutional head of the Indian Union have started and will become established in course of time as in the case of the monarch in England

It follows therefore that the executive power in the Indian Constitution is really vested in the Ministers or the Cabinet as in England The

[8] *Ibid* Art 78

Cabinet enjoying as it does a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility the most important questions of policy are all formulated by them [9] This fusion of the executive and the legislature the responsibility of government lying with the Council of Ministers who are in turn responsible to the legislature, is in substance a reproduction of the British Cabinet system evolved in the course of years by English constitutional precedent

PARLIAMENT

As in England the Lower House is the predominant House A Money Bill which has in the Constitution much the same meaning as in England can be introduced only in the House of the People After a Money Bill has been passed by the House of the People it is transmitted to the Council of States for its recommendations The recommendations of that House however may either be accepted or rejected by the Lower House If these recommendations are not accepted by the Lower House the Bill is to be deemed to have been passed by both the Houses in the form in which it was passed by the House of the People without any of the amendments

[9] *Rai Sahib Ram Jawaya Kapur v State of Punjab* (1955) 2 S C R 225 236 237

recommended by the Council of States[10] *Provisions* are however made for a joint sitting of both Houses in certain cases but that procedure has no application to a Money Bill[11]

The procedure in financial matters providing for an annual financial statement of the estimated receipts and expenditure submission of so much of the estimates as do not relate to expenditure charged upon the Consolidated Fund of India to the vote of the House and a provision for Bills for the appropriation out of the Consolidated Fund of India of the expenditure charged by the Constitution on the Fund and other grants closely follows the English practice in this regard[12]

Provision is made for the privileges and immunities of the Houses of Parliament and its members Subject to the provisions of the Constitution and to the rules and standing orders regulating the procedure of Parliament there is to be freedom of speech *in Parliament* No member of Parliament *is to be* liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any of its committees The Constitution having defined some of the powers privileges and immunities of Parliament and its members takes care to provide that in other respects the powers privileges and immunities of each House of a Parliament and of the members and the committees of each

[10] Indian Constitution Art 109
[11] *Ibid* Art 108
[12] *Ibid* Arts 112 113 and 114

House shall be such as may from time to time be defined by Parliament by law and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees, at the commencement of this Constitution [13] Thus English parliamentary practice and tradition have in express terms been made applicable to the Indian Houses of Parliament until departed from by law made by the Indian Parliament itself Not infrequently have the ancient precedents referred to in May s *Parliamentary Practice* and other books on the history and practice of the British Parliament been referred to when questions arose in regard to the powers and privileges of Parliament and its members These have also on more than one occasion been referred to by the Supreme Court of India when questions in regard to the powers of the legislatures when breaches of privilege occur had to be debated in the court

But the extent of the legislative power of the British and the Indian Parliaments is not comparable In England Parliament is supreme There is no limit or bar to the legislation which it may enact On the other hand the Indian Parliament functioning under the written Constitution of India is a legislature of limited powers The essence of a federal constitution is the division of powers between the federal Union which is the general Government and the constituent states the regional governments While some powers of legislation and taxation are reserved

[13] *Ibid* Art 105

to the general Government some other powers of the same nature are reserved to the regional governments The Constitution of India follows this pattern It enumerates subject matters of legislation on which on the one hand the Parliament, and on the other hand the state legislatures may exclusively legislate Parliament may not by its legislation trench on the state field of legislation There has also been provided a concurrent field of legislation which both the Union Parliament and the state legislatures may cover The residuary powers of legislation remain however with Parliament The validity therefore of legislation made in the Indian Parliament can be questioned on the ground of Parliament having legislated on subjects with respect to which it is not competent to legislate

We shall have occasion to examine later a feature of the Indian Constitution which consists in the Bill of Rights it enacts naming them fundamental rights These are certain rights vested in the citizen and others which even parliamentary legislation cannot invade or affect Indeed the Constitution in express terms makes laws affecting or abridging these rights void The Indian Parliament is thus not only restricted as to the subject matters on which it can legislate but there is imposed on its legislative powers an additional fetter in that it cannot legislate so as to affect or abridge fundamental rights

This vital difference between the powers of the British Parliament and the Parliament of the Union of India has been thus explained by the Supreme

Court of India 'A distinction however exists between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by which could not be challenged on the ground of incompetency and a legislature which enjoys only a limited or a qualified jurisdiction If the constitution of a state distributes the legislative powers amongst different bodies which have to act within their respective spheres marked out by specific legislative entries or if there are limitations on the legislative authority in the shape of fundamental rights questions do arise as to whether the legislature in a particular case has or has not in respect of the subject matter of the statute or in the method of enacting it transgressed the limits of its constitutional powers [14]

Therefore when a Parliament with limited powers like the Indian Parliament legislates frequently the legislation has to be closely examined in order to determine whether Parliament has exceeded its powers in enacting it The transgression of its powers may be patent manifest or direct but it may also be disguised covert and indirect Legislation by which Parliament has exceeded its powers in a covert or indirect manner has been described as colourable legislation by some judges The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers yet in substance and

[14] *K C Gajapati Narayan Deo v State of Orissa* (1951) S C I 1 11

in reality it transgressed these powers the transgression being veiled by what appears on proper examination to be a mere pretence or disguise This has led courts to lay down the principle that *Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the legislature is really doing* [15]

Judicial Control over Legislation

When a question of Parliament having exceeded its legislative powers arises which authority is to decide it? We have already noticed the division of functions between the three departments of government If one of them the legislature exceeds its powers one would expect that there would be an impartial authority independent of these three departments of government which should have the power to determine *whether there has been an excess in the exercise* of legislative power It may well be urged that the *courts of law which are but a part of the judicial* department of the government would not be the *appropriate organs to determine such questions* A federation which necessarily postulates a division of powers between the general and the regional governments and occasional conflicts in the exercise of these powers would seem to need an authority independent of the general and regional governments

[15] *Att Gen for Ontario v Reciprocal Insurers & Ors* [1924] A C 328 at 337

which could when controversies arise make decisions as to the validity of the exercise of their respective legislative or administrative powers The superior judiciary in India is as in Canada appointed by the general Government Why should the judicial organ of the state be entrusted with the determination of these important and sometimes vital questions? In the Swiss federation such a power is not completely exercised by the ordinary courts

It is not without controversy that the courts have been permitted to exercise this power It has frequently been urged that judges have introduced their opinions as to what the law should be in their interpretation of the Constitution and have on occasions given decisions contrary to the expressed will of the legislature chosen by the people Why the judicial organ of the state has been invested with this function may be explained in the words of Alexander Hamilton in *The Federalist*[16] The interpretation of the laws is the proper and peculiar province of the courts A constitution is in fact and must be regarded by the judges as a fundamental law It therefore belongs to them to ascertain its meaning as well as the meaning of any particular Act proceeding from the legislative body It was not till 1803 that the Supreme Court of the United States for the first time recognised this function of the courts and invalidated an Act of the Congress[17] Chief Justice Marshall there affirmed what has subsequently come

[16] No LXXVIII
[17] *Marbury v Madison* Cranch 137 177 178

to be known in countries governed by written constitutions as the doctrine of judicial review He stated that It is emphatically the province and duty of the judicial department to say what the law is

This is of the very essence of judicial duty The doctrine has since been firmly established in the United States and has been accepted in the Australian and Canadian federations

This doctrine evolved in other federations by judicial decisions and constitutional practice is implicit in the Indian Constitution in that it prescribes limits to the powers of legislation exercisable by Parliament However in so far as Parliament s powers of legislation are restricted by the Bill of Rights embodied in the Constitution it expressly provides that laws inconsistent with taking away or abridging the fundamental rights are to be void to the extent of such inconsistency or contravention [18] But it authorises the imposition by the legislature of certain reasonable restrictions in the public interest on the exercise of these rights The question of reasonableness is again in the last resort a matter for determination by the courts 'The determination by the legislature of what constitutes a reasonable restriction is not final or conclusive it is subject to the supervision by this court [19] So observed the Supreme Court of India declaring the court s power

[18] Indian Constitution Art 13

[19] *Chintaman Rao v State of Madhya Pradesh* (1950) S C R 759 765

of judicial review of legislation imposing restrictions on fundamental rights

The comment has been made that if legislation by Parliament is to be subject to examination by the courts not only in regard to its validity as being in excess of its prescribed legislative powers but also as to the reasonableness of what would have been enacted when it contravenes the fundamental rights we would be not only placing the courts above Parliament but turning the courts into a legislature The supremacy of Parliament would be substituted by the supremacy of the courts This view overlooks the basic fact that the Constitution itself empowers a judicial review so that when the courts express their views as to the reasonableness of restrictions imposed on the fundamental rights of the subject by legislation they do so pursuant to powers vested in them by the Constitution We have in truth not the supremacy of the courts but the supremacy of the Constitution The debates in the Constituent Assembly which preceded the framing of the Constitution of India like the debates in the American Convention show how acute was the controversy over the wisdom of permitting the legislative will to be questioned by the judiciary The makers of the Indian Constitution eventually chose to subject the decisions of the legislature in certain matters to a close and an impartial scrutiny by the judiciary in the fullest confidence that the judiciary would in making their determination be guided solely by the interests of the nation

Conscious of the responsibility and trust reposed in them the judges have tried to guard against the intrusion of their personal views in reaching their decisions in regard to the reasonableness of legislation. In evaluating such elusive factors and forming *their own conception of what is reasonable in all* the circumstances of a given case it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all and that the majority of the elected representatives of the people have in authorising the imposition of the restrictions considered them to be reasonable."[30]

Position in England

The supremacy of the rule of the law which is now an accepted principle of English constitutional law is said to have its origin in the theory held in the Middle Ages that law of some kind—the law either of God or man—ought to rule the world.[31] In the thirteenth century Bracton adduced *from this theory* the proposition that the King and other rulers were subject to law. He laid it down that the law bound

[30] *State of Madras v. V. G. Row* (19) S.C.R. 597, 607.
[31] W. S. Holdsworth, *History of English Law*, Vol. ... 131-132.

all members of the state whether rulers or subjects and that justice according to law was due both to ruler and subject This view was accepted by the common law lawyers of the fourteenth and fifteenth centuries Then came the rise of the power of Parliament which is said to have both emphasised and modified the theory of the supremacy of the law That the rise of the power of Parliament emphasised the theory is shown by the practical application given to it by Chief Justice Fortescue in Henry VI s reign He used it as the premise by means of which he justified the control which Parliament had gained over legislation and taxation That the rise of the power of Parliament modified the theory is shown by the manner in which the theory of the supremacy of the law was combined with the doctrine of the supremacy of Parliament The law was supreme but Parliament could change and modify it -

Thus English constitutional history tells us that the idea of a fundamental law operating as a check both on Crown and Parliament prevailed in the seventeenth century Following medieval precedents (*e g* in 1450 the Court of Common Pleas declared a statute to provide for the custody of the seal of a religious house to be impertinent to be observed and void and in 1506 the same court refused to give effect to a statute of Henry V which would have the effect of making the King a parson [3]) the courts

[22] Report of Committee on Ministers Powers 1932 Reprint 1936 p 71

[23] Cited by Roscoe Pound *The Development of Constitutional Guarantees of Liberty* pp 25 26

enforced fundamental laws against Parliament and struck down its laws as being against common right and reason These and several other cases have been regarded as instances of judicial nullification of statutes which were against the fundamental law It would appear to be one of Cokes doctrines that statutes contrary to common right and reason and therefore to fundamental law were void It would *seem therefore that there existed at one time even* in England a kind of judicial review of statutes on the ground that they offended against natural or fundamental law a position which has some analogy to a law being struck down as being opposed to the fundamental law of the Constitution However the idea of a fundamental law overriding parliamentary statutes soon lost ground in England and the Bill of Rights in 1689 set up parliamentary sovereignty in England after the attempt to set up royal absolutism had failed The supremacy of Parliament in its present form does not appear however to have been fully received till the nineteenth century Sir William Blackstone would not appear to be clear about the absolute sovereignty of Parliament in his *Commentaries* published in 1765 [24]

The Indian legislatures constituted in British times under the various Government of India Acts were legislatures with powers over circumscribed fields though they had plenary powers in the fields entrusted to them Questions therefore arose about the

[24] *Cf Commentaries* Bk I pp 121 125 127 J W Gough *Fundamental Law in English Constitutional History* p 190

validity of legislation enacted by these legislatures and the courts in India were even before the advent of the Constitution of 1950 familiar with the doctrine of *ultra vires* which made laws beyond the powers of the enacting legislature void and unenforceable It was easy for them therefore to give effect to the doctrine of the voidability of laws on the ground that they were beyond the powers of the legislature which enacted them when the Constitution of 1950 came into force Indeed the express provision as to judicial review contained in the Indian Constitution is said by the Supreme Court of India to have been enacted as a matter of abundant caution Even in the absence of these provisions if any of the fundamental rights was infringed by any legislative enactment the court has always the power to declare the enactment to the extent it transgresses the limits invalid -[25]

We may perhaps summarise the fundamental distinction between English constitutional practice and Indian constitutional law in regard to a possible challenge to legislation by stating that whereas in England parliamentary legislation can be overthrown only through the operation of democratic political processes as a result of which Parliament itself may repeal or amend it in India the challenge to it can be made in appropriate cases even by legal process and judicial review

[25] A K *Gopalan* v *State of Madras* (1950) S C R 88 at p 100

DELEGATION BY PARLIAMENT

The experience of all democratic countries shows the enormous increase of delegation of the powers of subordinate legislation to the executive and other authorities The extent of such delegation is necessarily wider in a state like India striving after the ideal of a social welfare state It is interesting therefore to note the somewhat differing lines of approach in England and in India to the problem of the validity of delegated legislation This arises out of the basic difference between the powers of the legislatures in the two countries one with omnipotent powers of legislation and the other with restricted powers delimited by a written constitution In England no question can arise of Parliament s power to delegate even the widest legislative functions to a legislature created by it or to the executive The colonial and the Indian legislatures of the nineteenth century were created by Acts of Parliament Indeed the legislatures of the great Dominions of Canada and Australia are born of parliamentary statutes Even the foundation of the Republic of India with its legislatures can be traced to the exercise by Parliament of its power of delegation The British Parliament can even abdicate its functions as it has done in respect of the Dominions by the Statute of Westminster In India the position is very different The Indian Parliament must discharge its primary legislative functions itself and not delegate them to others It is free to legislate within

its sphere in any way which appears to it to be best to give effect to its intention and policy in making a particular law and it may for this purpose utilise any outside agency to any extent it finds necessary It cannot however abdicate its legislative functions and must therefore while entrusting power to an outside agency see that such agency acts as a subordinate authority and does not become a parallel legislature The essential legislative functions have been held to consist in declaring the legislative policy and laying down the standard which is to be enacted into a rule of law The legislature must retain in its own hands these essential functions Subject to these requirements the task of subordinate legislation which by its very nature is ancillary to the statute can be delegated to any other authority In India whenever the validity of a delegated power is challenged the question arises whether in delegating the power the legislature has abdicated its essential function of legislation"[26] No such question can arise in England by reason of the sovereignty of Parliament and its unlimited power of legislation

Subordinate Legislation

Apart from what has been discussed the position in India in regard to subordinate legislation is not different from that in England The exercise of the powers if properly delegated are subject to the con

[26] *In re The Delhi Laws Act 1912* (1951) S C R 747 and *Rajnarain Singh v Chairman Patna Administration Committee* (1955) 1 S C R 290

trol of the courts which could be invoked if persons entrusted with the statutory powers exceed the authority conferred on them by the statute"[27] In India the exercise of the delegated power so as to affect the fundamental rights would be struck down for the simple reason that the repository of delegated power cannot act in a manner in which the legislature itself from which it derives its authority cannot act[28] What Lord Shaw stated in *R v Halliday* is as applicable in India as in England "The author of the power is Parliament the wielder of it is the Government Whether the Government has exceeded its statutory mandate is a question of *ultra vires* or *intra vires* In so far as the mandate has been exceeded there lurk the elements of a transition to arbitrary government and therein of grave constitutional and public danger"[29]

In the course of delegation of power to the executive it frequently becomes necessary for the legislature to entrust it with a power to make decisions These decisions often determine the rights of private persons and result in depriving them of access to the ordinary courts of law The ever growing extension of governmental activities particularly in welfare states has greatly multiplied the occasions on which

[27] Report of the Committee on Ministers Powers 1932 1956 reprint p 19 Allen C K *Law in the Making* 6th ed pp 549 555 *Radha Krishan v Compensation Officer* A I R (1954) All 202

[28] *Dwarka Prasad Laxmi Narain v State of Uttar Pradesh* (1954) S C R 803 and *State of Rajasthan v Nath Mal* (1954) S C R 982

[29] *R v Halliday* [1917] A C 260 at 287

an individual may be at issue in regard to his rights with the administration or with another citizen or a statutory body The citizen s rights are thus con tinually being adjudicated upon by administrative tribunals which are growing in number and impor tance The general view is that social and economic changes in all modern states make the existence of administrative tribunals as a system of adjudication inevitable The new wants of a new age have been met in a new manner by giving statutory powers of all kinds to these tribunals The problem therefore in all modern states is to provide procedures and remedies which will make the adjudications of these tribunals conform to natural justice The citizen who is affected is entitled not only to just decisions but to decisions which are rendered after giving him an opportunity to be heard and in a manner which will ensure that these tribunals have acted in accord ance with law and not in excess of their authority

ADMINISTRATIVE TRIBUNALS

It is interesting to note how the development of the law in regard to the decisions of administrative and inferior tribunals has proceeded on parallel lines in England and in India

The scope of the jurisdiction of the High Court of Justice in England in this regard has been thus stated If a properly constituted inferior tribunal has exercised the jurisdiction entrusted to it in good faith not influenced by extraneous or irrelevant con siderations and not arbitrarily or illegally the High

Court cannot interfere When exercising its super visory powers the High Court is not sitting as a Court of Appeal from the tribunal but it has power to prevent the usurpation or mistaken assumption by the tribunal of a jurisdiction beyond that given to it by law and to ensure that its decisions are judicial in character by compelling it to avoid extraneous considerations in arriving at its conclusion and to confine itself to decision of the points which are in issue before it Likewise a Minister or Ministerial Tribunal is not autocratic but is an inferior tribunal subject to the jurisdiction which the Court of King's Bench for centuries and the High Court since the Judicature Acts has exercised over such tribunals [30] The House of Lords has expressly decided that this jurisdiction extends to quasi judicial as well as judicial functions [31]

The position of the ordinary courts in India in respect of the decisions of administrative bodies or persons entrusted with statutory powers had been explained by the Privy Council [32] It had stated that when such decisions are challenged the exclusion of the civil courts is not to be readily inferred from a statute Such exclusion must either be explicitly expressed or clearly implied Even in cases where the statute excludes the jurisdiction of the courts the

[30] Report of the Committee on Ministers Powers 1932 1936 reprint pp 98 99 *R v The Board of Education* [1910] 2 K B 165 179

[31] *Minister of Health v The King (on the Prosecution of Yaffe)* [1931] A C 494

[32] *Secretary of State v Mask & Co* (1940) 67 Ind App 222 236

courts can examine into cases where the statute has not been complied with or the statutory tribunal has not acted in conformity with the fundamental principle underlying judicial procedures

The Constitution of 1950 has in this matter taken a notable step forward Having included a Bill of Rights in the Constitution the Constitution makers had necessarily to provide remedies for the enforcement of these rights They also envisaged a welfare state with its inevitable accompaniment of a mass of parliamentary and subordinate legislation which would involve constant interference with the normal activities of the citizen It was therefore essential to provide procedures and remedies which would enable the citizen to approach the courts and obtain speedy and effective redress against interference with his fundamental rights or an unconstitutional enactment or unwarranted administrative action These remedies are to be found in article 226 and article 32 of the Constitution Under article 226 the High Courts have jurisdiction throughout the territories subordinate to them to issue to any person or authority including in appropriate cases any Government directions orders or writs including writs in the nature of habeas corpus mandamus, prohibition quo warranto and certiorari or any of them not only for the enforcement of the fundamental rights but also for any other purpose Almost in identical words a similar jurisdiction has been conferred by article 32 on the Supreme Court of India but this jurisdiction is restricted to cases of invasion of funda

mental rights This is a very substantial advance upon the position that existed in regard to the issue of prerogative writs before the advent of the Constitution Under the constitutional provisions the court s powers are not restricted to the issue merely of the prerogative writs They can issue any directions whatever these writs being merely illustrative of the powers the courts possess In the exercise of these powers the courts have refused to be necessarily guided by conditions which govern the exercise of these writs in England In view of the express provisions we need not now look back to the early history of procedural technicalities of these writs in English law nor feel oppressed by any difference or change of opinion expressed in particular cases by English judges says the Indian Supreme Court Indeed the courts have declared statutes to be invalid and unconstitutional in the exercise of this jurisdiction The courts can in the exercise of these powers also investigate if necessary disputed questions of fact

The right to move the Supreme Court for the enforcement of fundamental rights has itself been made a right guaranteed by the Constitution under *the head of Right to Constitutional* Remedies Thus a contravention of his fundamental right entitles the citizen to seek relief from the highest court in the country Parliament cannot take away his right to this constitutional remedy nor can the court itself refuse to deal with an application which

in fact raises a question of the contravention of a fundamental right

Thes remedies have been largely availed of by the subject to his great advantage The Law Commission of India of 1955 has stated that The beneficial effects of this new jurisdiction cannot be over estimated Its existence has made the citizen conscious that the state exists primarily for his good and that under its laws he has rights of which he can obtain quick enforcement by the highest court in the state at a very reasonable cost The knowledge that a citizen can bring a matter in a summary manner before the courts in a few days time after the promulgation of the law or order has made our government departments wary in their actions The very large number of statutes and orders which have been struck down by the High Courts in the exercise of their jurisdiction under article 226 is a powerful testimony to the effective nature and the essential utility of the remedy [33]

Apart from these procedures the Constitution of India has conferred an almost unlimited jurisdiction on the Supreme Court of India which empowers it in its discretion to entertain appeals from any judgment decree determination sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India [34] The court has refused to define or set any limits to this jurisdiction It is not possible to define with any

[33] Report 1958 Vol II p 658
[34] Indian Constitution Art 136

precision the limitations on the exercise of this juris diction The limitations whatever they be are implicit in the nature and character of the power itself It is however plain that when the court reaches the conclusion that a person has been dealt with arbitrarily or that a court or tribunal within the territory of India has not given a fair deal to a litigant then no technical hurdles of any kind can stand in the way of the exercise of this power because the whole intent and purpose of this article *is that it is the duty of this court to see that injustice* is not perpetuated or perpetrated by decisions of courts and tribunals [35] In the exercise of this jurisdiction the highest court in the land has enter tained appeals from industrial courts election tri bunals and a number of other statutory adjudicators

It could therefore be said that in India the powers of the courts in controlling and arresting arbitrary action by the executive or administrative tribunals are more far reaching than in England and can per haps be invoked at lesser cost and with greater expedition

Judicial Power

In this distinct and separate existence of the judicial power in a peculiar body of men nominated indeed but not removable at pleasure by the Crown consists one main preservative of the public liberty said

[35] *Dhakeshwari Cotton Mills Ltd* v *Commissioner of I T W Bengal* (1955) 1 S C R 941 949

Blackstone [6] Earlier we have seen how an impartial and independent judiciary was gradually built up in the British times The Constitution of India continued and strengthened this tradition by incorporating into itself what may be called an integrated judicial system designed to function impartially beyond the range of executive influence and irremovable except by Parliament under circumstances prescribed by the Constitution A judicial system of this nature was essential in order to preserve and maintain the ideals of democracy and freedom and of the Rule of Law embodied in the Constitution Only a judiciary firmly entrenched above all pressures could be adequate to perform the wide and weighty functions which the Constitution imposes upon the Indian judiciary

The Constitution has established an integrated judicial structure empowered to enforce Union as well as state laws At the apex of the structure is the Supreme Court of India which is constituted the final court of appeal in all matters whether arising in respect of state laws or Union laws As in other federations power is reserved to the Union to establish its own courts [37] No such courts have however been established and Union laws like state laws are administered in the states by the state courts In order to ensure the maintenance of standards in the selection of the judiciary the Constitution has devised a machinery for its selection and has given

[36] *Commentaries* Vol 1 p 269
[37] Indian Constitution Art 247

the higher judiciary itself a voice in its own selection The Union executive is the appointing authority for the Union as well as the higher state judiciary But it is enjoined that these appointments are to be made after consultation with the Chief Justice of India in the case of appointments to the Supreme Court and after consultation with the Chief Justice of India as well as the Chief Justice of the state concerned in the case of appointments to the High Courts in the states[38] The state High Courts have also to be consulted by the state executive in the selection of the subordinate judiciary in the state[39] Thus in a sense the Indian judiciary can be said to be autonomous It is also irremovable as the judges of the Supreme Court and the state High Courts can be removed from their office only on grounds specified in the Constitution and after an address by each House of Parliament supported by the vote of a specified majority[40]

Though the power of appointment to the superior judiciary rests in the Union Government and the power of removal in the Union Parliament the Union as well as the state judiciary have in the exercise of their functions shown independence and impartiality in interpreting the Constitution and in issues raising conflicts between the general and regional governments and the executive and the citizen It is the tradition in any event in countries

[38] Indian Constitution Art 124
[39] *Ibid* Arts 233 and 234
[40] *Ibid* Arts 124 217

which have come under the influence of Anglo Saxon jurisprudence for the judges to regard themselves as impartial interpreters holding the balance even between the claims on the one hand of the general government and on the other of the regional governments and between the citizen and the legislature or the executive So deeply has the Indian judiciary been imbued with these traditions that judges who had expressed their views on certain aspects of the Constitution before their appointment have in the consciousness of their judicial role of impartiality been led to modify and change them

Bill of Rights

A vital difference between the English and Indian constitutional systems is the incorporation in the Indian Constitution of a Bill of Rights

In England fundamental liberties are protected not by a specific law but by a powerful public opinion These liberties have remained unshaken in England though theoretically they could be affected and even destroyed by an Act of Parliament But Parliament itself has fought for these liberties on behalf of the people against royal absolutism and has been a powerful force in the creation and maintenance of these liberties The English lawyer thinks of democracy not in terms of fundamental legal principles He has never tried to express and

does not think of expressing the fundamental ideas which are implicit in his Constitution [41]

India has however chosen a different course Following the pattern of the Constitution of the United States she has enacted a Bill of Rights As in other matters the enactment of the Bill of Rights in the Indian Constitution has its roots in the historical background of the Constitution Even when the Government of India Act of 1935 was being framed by the British Parliament demands were made on behalf of Indians for the incorporation of a Bill of Rights in that Act That view was rejected on the ground that such a declaration of rights in the abstract would serve no useful purpose With its long history of foreign rule and sensitive to its disabilities and discriminations the Indian mind had come to regard a Bill of Rights as an essential part of a Constitution Some of the makers of the Indian Constitution were in the vanguard of India s fight for freedom and the memory of their experiences made a declaration of rights in the Constitution inevitable The Indian reaction (in enacting the Bill of Rights) like the American reaction is in large measure a product of British rule [42]

Nor must we forget the wide divergence between conditions in England and in India The Indian legislatures had not the age old ancestry and tradition of the British Parliament India is a country of

[41] Sir Ivor Jennings *Some Characteristics of the Indian Constitution* pp 3 4
[42] *Ibid* p 85

vast distances inhabited by peoples belonging to different races and religions and speaking different languages Many regions now forming part of the country had never known democratic government A large part of the backward population of the country and some minorities required special treatment and protection The rights and interests of the divergent population in varying stages of development could be adequately safeguarded only by provisions guaranteeing their rights At the advent of freedom the position in India was in no sense comparable to that in the Dominions of Canada or Australia

Further the trend in modern Constitutions is unmistakably towards the enactments of a Bill of Rights This is not unnatural A democracy means government by the majority In such a government it becomes necessary to safeguard the essential freedoms of the citizen and particularly of the citizens constituting the minorities

The Bill of Rights in the Indian Constitution is in part indicative of peculiar Indian conditions While most of the rights embody the familiar essential freedoms some of these rights derive from the Indian economic and social structure One may instance the protection accorded to the distinct language script, culture and education of the minorities the protection against traffic in human beings and forced labour the ban on the practice of untouchability the prohibition of discrimination on ground of religion

race or caste and equality of opportunity in matters of public employment[43]

It is stated that the Indian Bill of Rights is based on no consistent philosophy[44] The comment has some force The fundamental rights in the Indian Constitution may be said to be a combination of the usual Bill of Rights interspersed with provisions which could be understood only in the context of contemporary Indian society

The Indian Bill of Rights lacks the conciseness of its counterpart in the United States which is a virgin document However in framing her Bill of Rights India has immensely profited by the experience of the United States of over a century and a half and of other countries who had founded themselves upon the Bill of Rights in the American Constitution

The makers of the Indian Constitution were brought up in the tradition of the British legal system and they had learnt to respect and admire the liberties which were regarded as the birthright of Englishmen Some of them had their early training in England This explains why in the main the fundamental rights in the Indian Constitution are but the familiar freedoms known to English constitutional law

It is true that in framing some of the fundamental rights such as the right to equality[45] the Constitution borrows the phraseology of the American Bill of

[43] Indian Constitution Arts 29 30 23 17 15 and 16
[44] Sir Ivor Jennings *Some Characteristics of the Indian Constitution* p 50
[45] Indian Constitution Art 14

create a national government by the Articles of Confederation of 1777 which had brought them into difficulties met in the Federal Convention of 1787 to frame their constitution they wanted nothing to be left to conjecture They insisted that their basic rights be set down in black and white If the national government was to be strengthened the more apparent was the need to delimit its powers and to enumerate the liberties which the citizen was to enjoy The Bill of Rights and the Fourteenth Amendment were declaratory of natural liberties which were also common law liberties The common law rights of Englishmen became the natural rights of man [46] This brief glimpse of the sources and development of the American Bill of Rights explains not only the insistence of the Indian mind on a constitutional Bill of Rights it also accounts for some of the common law freedoms entering the Indian Constitution through the door of the American Bill of Rights

Personal Liberty

The protection of life and personal liberty is to be found in the Indian Constitution in the words No person shall be deprived of his life or personal liberty except according to procedure established by law [47] The words procedure established by law bear a close resemblance to the phrase due process of law

[46] Roscoe Pound *The Spirit of the Common Law* 1931 reprint p 90
[47] Indian Constitution Art 21

by statutes passed from time to time in England No person can be convicted for an offence except under a law in force at the time of the commission of the act[53] There would of course be no bar to the British Parliament enacting an *ex post facto* law Yet in England the courts would construe legislation which turns an act till then innocent into an offence as applying to future acts unless the legislature had said otherwise[54] Blackstone it will be remembered denounced *ex post facto* laws[55] We have also a provision that no person can be prosecuted and punished for the same offence more than once[56] The roots of that principle are to be found in the well established rule of the common law of England that where a person has been convicted of an offence by a court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence

To the same effect is the ancient maxim *nemo bis debet puniri pro uno delicto* or as it is sometimes written *pro eadem causa*[57] At common law an accused on his trial in a criminal prosecution was not a competent witness either for the prosecution or for the defence[58] Though the common law rule has been modified in England by statutes a provision in the Indian Constitution incorporates some aspects of

[53] *Ibid* Art 20 (1)
[54] *Butchers Hide Skin and Wool Co Ltd v Seacome* [1913] 2 K B 401
[55] *Commentaries* Bk I p 46
[56] Indian Constitution Art 20 (2)
[57] *Maqbool Hussein v State of Bombay* (1953) S C R 730 736
[58] Halsbury *Laws of England* 3rd ed Vol 10 p 480 para 878

this common law rule and provides that No person accused of any offence shall be compelled to be a witness against himself [59]

SEVEN FREEDOMS

Under the head Right to Freedom the Indian Constitution groups together certain rights which may be described as the seven freedoms These are common law rights which in England may well be put under the comprehensive heading of the liberty of the subject They are really implications drawn from the two principles that the subject may say or do what he pleases provided he does not transgress the substantive law or infringe the legal rights of others whereas public authorities (including the Crown) may do nothing but what they are authorised to do by some rule of common law or statute Where public authorities are not authorised to interfere with the subject he has liberties [60]

We first have the right to freedom of speech and expression [61] This freedom is however subject to reasonable restrictions imposed in the interests of the security of the state friendly relations with foreign states public order decency or morality or in relation to contempt of court defamation or incitement to an offence [62] Though different in some respects these provisions reproduce broadly the posi

[59] Indian Constitution Art 20 (3)
[60] Halsbury *Laws of England* 3rd ed Vol 7 pp 195 196 para 416
[61] Indian Constitution Art 19 (1) (*a*)
[62] *Ibid* Art 19 (2)

tion in England where the right to freedom of speech or discussion means that any person may write or say what he pleases so long as he does not infringe the law relating to libel or slander or to blasphemous obscene or seditious words or writings [63] Some of the restrictions on the right of freedom of speech in the Indian Constitution may be found in some of the English statutes [64] The restrictions intended to protect friendly relations with foreign states finds a parallel in English common law which provides that a person who publishes any libel or words which will expose to hatred or contempt any foreign prince or other persons with intent to disturb peace and friendly relations between the United Kingdom and the country to which any such prince or other persons belong would be guilty of misdemeanour

Another freedom is the citizen s right to assemble peaceably and without arms Reasonable restrictions on this right may be imposed in the interests of public order Here again we have a provision not substantially different from the right of public meeting in English law Any persons may meet together, so long as they do not thereby trespass upon private rights of property or commit a nuisance or infringe the law relating to public meetings or unlawful assemblies [65] In England certain assem

[63] Halsbury s *Laws of England* 3rd ed Vol 7 p 197 para 418

[64] *e g* Treason Act 1795 Unlawful Oaths Act 1797 Theatres Act 1843 Official Secrets Act 1911 Police Act 1919 Incitement to Disaffection Act 1934 and Public Order Act 1936

[65] Halsbury s *Laws of England* Vol 7 p 198 para 418

blies which may not be unlawful according to the common law may be regulated by the authorities under statutes[66] Though the Public Order Act, 1936 altogether prohibits the carrying of unauthoris ed weapons at public meetings the carrying of arms in an assembly, it would appear does not make an assembly unlawful under the common law In India however the bar to carrying arms to an assembly is absolute

The right to form associations or unions is in India subject to reasonable restrictions imposed in the interests of public order or morality[67] Freedom of association is a common law right subject to restric tions placed on it by statutes such as the Companies Act of 1948 or the Trade Union Acts The crime and tort of conspiracy are the principal restrictions which English law places upon freedom of associa tion[68] The law in India relating to associations like companies and trade unions broadly follows English statute law We have in India the Societies Regis tration Act 1860 the Co operative Societies Act 1912 the Trade Unions Act 1926 and the Com panies Act 1956 which is largely based on the English Companies Act of 1948

Among the guaranteed freedoms are the rights to move freely throughout the territory of India and to

[66] *e g* Tumultuous Petitioning Act 1662 Riot Act 1714 Seditious Meetings Act 1817 Unlawful Drilling Act 1819 Metropolitan Police Act 1839 Public Meetings Act 1908 Public Order Act 1936

[67] Indian Constitution Arts 19 (1) (*c*) and 19 (4)

[68] Wade and Phillips *Constitutional Law* 5th ed p 390

reside and settle in any part of its territory These rights have their origin in the differences in race religion and language of the population in different areas of the country and the exclusive and parochial tendencies which have been fostered by these differ ences The feeling of a common Indian citizenship and pride in Indian nationhood are plants of recent growth which need nurture and protection These rights are an attempt to further the growth of unity and homogeneity all over the land

The freedom to acquire hold and dispose of property is reminiscent of the three rights in private property inherited by every Englishman referred to by Blackstone which are said to consist in the free use enjoyment and disposal of all his acquisitions without any control or diminution save only by the laws of the land Statutes passed by the British Parliament have from time to time tried to keep the balance between private rights to property and social interest[69] The principle that runs through these statutes would appear to be that restrictions may be imposed upon the exercise of rights to private pro perty on grounds of public order or public health and policies evolved for the common good Similar are the reasonable restrictions which may be imposed in India on the citizen s rights to property in the public interest Statutes restricting rents relieving agricultural indebtedness bringing about agrarian

[69] Supplies and Services (Extended Purposes) Act 1947 Monopoly and Restrictive Practices (Inquiry and Control) Act 1948 and Rent Restriction Acts

reforms ensuring supply of commodities essential to the community and imposing restrictions on the right of management of limited companies have been en acted in India Their validity has been upheld notwithstanding the fundamental freedoms in regard to rights to private property

The Constitution enabled the state to acquire the citizen s property for a public purpose under the authority of a law But the law had to provide compensation for the property taken or specify prin ciples for the determination of the compensation [70] Agrarian reform legislation in various parts of the country by which interests in land intervening be tween the state and the cultivators were acquired provided compensation which was challenged as being inadequate and even illusory Payment of compen sation in the sense of a proper market value was in the circumstances of the country not practicable The courts faced with the task of interpreting what compensation in the constitutional provision meant could only answer by stating that the expropriated owner must be paid the market value of his interest These decisions were followed immediately by an amendment of the Constitution which in sub stance took away the powers of the courts to adjudge the compensation and made the legislative judgment as to the adequacy of the compensation final Thus was removed a difficulty created by a constitutional provision in the way of urgently needed changes in the agrarian pattern in some parts of the country

[70] Indian Constitution Art 31

The last of the freedoms is the right to practise a profession and to carry on an occupation trade or business The right is to be subject to restrictions imposed in the interests of the general public and particularly to the carrying on by the state of any trade business industry or service The provision enabling state monopolies to be established was brought in by an amendment of the Constitution the courts having held that though the state may regulate the enjoyment of these rights it could not altogether prohibit their exercise

Each of the freedoms we have discussed is as we have seen subject to legislative restrictions provided they are reasonable and imposed in the interests of the general public The phrase in the interests of the general public reminds us of Blackstone Political or civil liberty is no other than natural liberty so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the public [71] These provisions put on the courts the difficult duty of deciding whenever legislation is challenged whether it is in the circumstances reasonable and has been enacted in the public interest The standard to be applied by the courts must necessarily vary according to the facts and circumstances surrounding each piece of legislation However the manner in which the courts should proceed in deciding the question whether legislation is reasonable has been broadly stated

[71] Blackstone *Commentaries* Vol I p 125

by the Supreme Court of India in the following words

It is important in this context to bear in mind that the test of reasonableness wherever prescribed should be applied to each individual statute impugn ed and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases The nature of the right alleged to have been infringed the underlying purpose of the restrictions imposed the extent and urgency of the evil sought to be remedied thereby the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict [72]

Though the Constitution embodies these funda mental freedoms it also contains a somewhat startling restriction on them in the shape of a power in the legislature to enact laws on what has been called preventive detention [73] The expression is used to distinguish this kind of detention from the deten tion which results after a person has been prosecuted and punished for a crime These powers originated in certain emergency provisions enacted in British times Disturbed conditions after the partition of India in 1947 and in some parts of the country in subsequent years led the framers of the Constitution to enact provisions empowering detention of this nature Such detention can be authorised only for reasons connected with defence foreign affairs the security of India the security of the states the

[72] *State of Madras* v V G Row (1952) S C R 597 607
[73] Indian Constitution Arts 22 (3) (*b*) (4) (5) (6) and (7) Seventh Sched List I entry 9 List III entry 3

maintenance of public order and the maintenance of essential supplies and services Though an opportunity is afforded to the person detained to answer the grounds for his detention put forward by the executive and his case is examined by a judicial body such detention is in essence an arbitrary interference with the liberty of the subject who is denied a hearing and a judicial trial Public opinion has naturally been very critical of the grant of such a power by the Constitution The courts of law while recognising the need for such measures during times of emergency have persistently and vigorously disapproved the use of these powers in normal times Indeed the courts have attempted by their interpretation of the Constitution to narrow down to the utmost limits the powers of preventive detention

Freedom of Conscience

The freedom of conscience known to English common law has been given a prominent place in the Indian Bill of Rights Subject to public order morality and health all persons are equally entitled to freedom of conscience and the right freely to profess practise and propagate religion[74] With this freedom is associated the freedom of every religious denomination to establish and maintain religious and charitable institutions to manage its own affairs in matters of religion and to acquire and administer property for the purpose[75] That however is not to

[74] Indian Constitution Art 25 (1)
[75] *Ibid* Art 26

prevent the state from regulating economic, financial or other secular activities associated with religious practice[76] The cultural and educational rights of minorities such as the establishment and administration of educational institutions of their choice and conserving their language script or culture are also protected[77] The Republic of India knows no state religion No taxation can be levied for the promotion of any particular religion or religious denomination Nor can any religious instruction be provided in any educational institutions wholly maintained out of state funds[78] The state in India stands above diversity of religions and religious creeds maintaining a strict neutrality and protecting the observance of all religious practices and cultures of different groups India has been described as a secular state

The Indian Constitution provides that the state shall not deny to any person equality before the law or the equal protection of the laws[79] Equality before the law is an expression familiar to English constitutional lawyers Equality before the law means that among equals the law should be equal and should be equally administered that like should be treated alike.[80] The phrase equal protection of the laws is derived from the Constitution of the United States The fundamental right to equality

[76] *Ibid* Art 25 (?)
[77] *Ibid* Arts 29 and 30
[78] *Ibid* Arts 27 and 28
[79] *Ibid* Art 14
[80] Sir Ivor Jennings *Law of the Constitution* 3rd ed p 49

before the law strikes at the enforcement of invalid laws[81] as well as the unequal enforcement of valid laws[82] Equal protection of the laws means the right to equal treatment in similar circumstances both in the privileges conferred and in the liabilities imposed by the laws[83]

The Indian courts have stretched the protection of the Bill of Rights even further than the American courts In the United States a distinction has been drawn between fundamental rights for the benefit of the citizen and those based on state policy A citizen could waive a right created for his benefit but not one based on state policy Recently the Supreme Court of India has by a majority refused to accept this doctrine and regarded all fundamental rights as resting on state policy The citizen may not therefore even if he wishes forgo his basic rights[84]

Directive Principles

We have in the Constitution apart from the Bill of Rights Directive Principles of State Policy These are based on the Irish Constitution These principles are not to be enforceable by courts But they are to be fundamental in the governance of the country and it is to be the duty of the governments

[81] *Ram Prasad Narayan Sahi v State of Bihar* (1953) S C R 1129

[82] *I G Row v State of Madras* A I R (1951) Mad 147 176 177 F B

[83] *State of West Bengal v Anwar Ali Sarkar* (1952) S C R 284 320

[84] *Basheshar Nath v I T Commissioner* A I R [1959] S C 149

legislatures and local authorities to apply these principles in making laws[85] These directives are wide in their sweep and embrace all the objectives of a modern welfare state One of the directives seeks the promotion of international peace and security Though these principles have no obligatory force they serve as beacon lights guiding state and other authorities in their movement towards building a welfare state The state is directed to shape its policies towards securing adequate means of livelihood to citizens equally to secure the distribution of ownership and control of the resources of the community so as to subserve the common good and so to work the economic system as to prevent concentration of wealth and means of production to the common detriment The Constitution endeavours to put before the authorities the ideal of social and economic uplift which has been so largely achieved in England These fundamental axioms guiding state policy though not obligatory, have been regarded by the courts of law as indicative of what would be public purposes and the interests of the general public Restrictions imposed by laws on the freedom of the citizen have been regarded as reasonable if they appear to have been imposed in furtherance of these directive principles of state policy In a manner these principles have been helpful to the courts in the performance of their onerous task of judicial review

[85] Indian Constitution Arts 36 and 51

AMENDMENTS

The Englishman may well ask how rapid economic progress and a social welfare state can be achieved under a written constitution which with its limited powers of legislation and Bill of Rights must impede the progress of all legislation designed for these purposes Difficulties have in this respect undoubtedly arisen in a certain measure by reason of some constitutional provisions However courts of law themselves imbued with the ideals of progress and social welfare have striven to their utmost in the exercise of their power of judicial review to further consistently with the fundamental law the objectives proclaimed by the Constitution On occasions when the provisions of the Constitution created impediments which were insurmountable the Constitution has been amended In the short space of about ten years there have been eight amendments of the Indian Constitution

Fortunately the method of amendment provided by the Constitution strikes a just balance between flexibility and rigidity It provides a variety of amending processes Some amendments can be made by ordinary majorities of Parliament Additional safeguards are however provided in the amending process in regard to those parts of the Constitution which are concerned with the division of power between the states and the Union In such cases the concurrence of the legislatures of half the states is required In the words of Professor Wheare 'This

variety in the amending process is wise but it is rarely found [86]

In its preamble the Indian Constitution states the sovereign resolve of the people of India to secure to its citizens justice in the social economic and political fields liberty in all spheres equality of status and opportunity and the promotion among them all of fraternity assuring the dignity of the individual and the unity of the nation The comprehensive character of this preamble has been referred to by Professor Ernest Barker in his preface to his treatise on *The Principles of Political and Social Theories* He has reproduced the preamble after the table of contents in his book as it seemed to him when he read it to state in brief and pithy form the argument of much of this book and it may accordingly serve as a keynote I am all the more moved to quote it as I am proud that the people of India should begin their independent life by subscribing to the principles of a political tradition which we in the West call Western but which is now something more than Western

[86] K C Wheare *Modern Constitutions* p 143

EPILOGUE

We have seen how the principles of the English common and statute law took root gradually in India in the seventeenth and eighteenth centuries and how they were, with suitable changes eventually firmly embedded in the structure of the great Indian Codes in the nineteenth century In areas like that of civil wrongs independent of contract which had remained unoccupied by the Codes the Indian courts filled the vacuum by drawing freely upon principles found in the common law of England and the decisions of the English courts

Lord Bryce[1] has compared the adoption of many branches of English law as the law in force in India with the manner in which Roman law became the law of the different countries forming part of the Roman Empire Professor Holdsworth however thinks that a more exact comparison would have been between the reception of English law in India and the reception of Roman law in the states of modern Europe from the twelfth to the sixteenth centuries It would have been more exact for two reasons In the first place the states of modern Europe received Roman law not because they were subjugated by Rome but because Roman law was more fit than any code of law of which they had knowledge to solve the problems of the more advanc

[1] The Extension of Roman and English Law throughout the World *Studies in History and Jurisprudence*

ed stage of civilization to which they were attaining It is exactly for the same reason that the rules of English law have been introduced into British India In the second place the Roman law, when it was received was adapted to its new environment So in India we may expect to see that the needs of India may produce modifications in English rules of law which with the help of the technical reasoning of the common law will produce new developments of common law principles [2]

The expectation has come true

For over a hundred years distinguished jurists and judges in India have basing themselves upon the theories of English common law and statutes evolved doctrines of their own suited to the peculiar need and environment of India So has been built up on the basis of the principles of English law the fabric of modern Indian law which notwithstanding its foreign roots and origin is unmistakably Indian in its outlook and operation

How one may ask does independent India look upon the system of laws created by the collaboration of great English and Indian minds? Conscious of its suitability to the needs of the people and the service it has rendered as a great influence welding the country together the makers of the Indian Constitution have left untouched the entire existing system Though the political ties have altered the Indian legal system based on English law still endures Says

W S Holdsworth Preface to the 1st ed of the *Law of Torts* by S Ramaswamy Iyer

the Constitution All the laws in force in the terri tory of India immediately before the commencemen of the Constitution are to continue in force unt altered repealed or amended [3] This provision em braces not only the statutes in force at the date of th Constitution but also personal and customary law and the common law principles applied in India b Indian judicial decisions Though the Constitutio envisages in the course of years the substitution o English by an Indian language acceptable to th majority of the nation the language of the law and of the superior law courts still continues to b English Decisions of the English courts are ye freely referred to and cited in the Indian courts and treated with respect It may therefore be said tha the evolution of Indian law continues to be largely influenced by the development of English law and the decisions of English courts

One may perhaps envisage the future in the words of Lord Wright In Blackstone s day the common law was the law of a few million people in England and Ireland Now in these islands there may be perhaps forty millions living under English law but the common law has long passed its old boun daries Under its sway live teeming millions of the United States Then there are Canada Australia and New Zealand great now but with unforeseeable potentialities The enormous sub continent of India has adopted except for family or other racial or religious law the common law which there regulates

[3] Art 372

the great mass of dealings between man and man In each of these great collections of mankind there are judges enunciating the law and schools teaching it and professors meditating upon it seeking to criticise and reform it England cannot have a monopoly or even a primacy in this great and widespread development [4]

With the ever growing expansion of Indian legal thought there is bound to be a greater interplay between legal minds in India and elsewhere in the world of Anglo Saxon jurisprudence As judges and lawyers in India resort freely to English decisions so may in course of time the English courts recognise Indian contributions to legal thought and principles

[4] *Legal Essays and Addresses* Preface p xiii

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Note This list does not include all the books referred to in the text

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